William F. Bacon, General Counsel
SHOSHONE-BANNOCK TRIBES
P.O. Box 306
Fort Hall, Idaho 83203
Telephone: (208) 478-3822
Facsimile: (208) 237-9736
Email: bbacon@sbtribes.com

Paul C. Echo Hawk
ECHO HAWK LAW OFFICE
P.O. Box 4166
Pocatello, Idaho 83205
Telephone: (208) 705-9503
Facsimile: (208) 904-3878
Email: paulechohawk@gmail.com

Douglas B. L. Endreson
Frank S. Holleman
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
Telephone: (202) 682-0240
Facsimile: (202) 682-0249
Email: dendreson@sonosky.com
fholleman@sonosky.com
admission pro hac vice pending

Attorneys for Shoshone-Bannock Tribes

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FMC CORPORATION, Plaintiff, vs. SHOSHONE-BANNOCK TRIBES, Defendant.	Case No. 4:14-cv-489-CWD **ANSWER TO FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND COUNTERCLAIM**

ANSWER TO FIRST AMENDED COMPLAINT

I. INTRODUCTION

1. The Shoshone-Bannock Tribes ("Tribes") have violated federal law, as defined by *Montana v. United States,* 450 U.S. 544 (1981) *(*"*Montana*"), by asserting tribal regulatory and judicial jurisdiction over the activities of FMC Corporation ("FMC") upon fee land owned by FMC lying partially within the Fort Hall Reservation. The Tribes have asserted jurisdiction over FMC's activities on its fee-owned land, in spite of the law that the Tribes are presumed to lack such jurisdiction. The Tribes cannot meet either of the two very narrow exceptions to *Montana's* general rule that tribes lack such jurisdiction.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 1 of the First Amended Complaint ("Complaint"). Answering the allegations of the second sentence of paragraph 1, Defendant admits that it asserts jurisdiction to require the Plaintiff to obtain a permit to store waste on land within the Fort Hall Reservation ("Reservation") that is owned by FMC in fee, and to pay the annual permit fee, and denies that the Tribes' assertion of jurisdiction is "in spite of the law that the Tribes are presumed to lack such jurisdiction." Defendant denies the allegations of the third sentence of paragraph 1, including Plaintiff's characterization of the *Montana* exceptions.

2. First, the Tribes cannot show that the "consent" necessary to establish the first *Montana* exception, because the "consent" alleged by the Tribes and found by the Shoshone-Bannock Tribal Court of Appeals ("Tribal Court of Appeals") is based on the Tribes' wrongful coercion of FMC's compliance through tribal demands of governmental authority.

ANSWER: Answering the allegations of paragraph 2, Defendant denies that "consent" rather than a consensual relationship, to the extent Plaintiff alleges that there is a difference

between the two, is necessary to establish jurisdiction under the first *Montana* exception; subject to the same qualification, Defendant denies that "consent" rather than "consensual relationship(s)" was the standard alleged by the Tribes under the first *Montana* exception, and found to have been satisfied by the Tribal Court of Appeals, Defendant denies that the consensual relationship found by the Tribal Court of Appeals was "based on the Tribes' wrongful coercion of FMC's compliance through tribal demands of governmental authority," and denies that the Tribes wrongfully coerced FMC's compliance "through tribal demands of governmental authority" or any other means.

3. Second, the Tribes also cannot prove under the second *Montana* exception that FMC's conduct substantially threatens or has some direct effect on the "political integrity, the economic security, or the health and welfare" of the Tribes. Contrary to federal law, the Tribal Court of Appeals ruled that the Tribes only needed to show a minimal potential risk, or perceived risk, of an adverse effect on Tribal health and welfare.

ANSWER: Defendant denies that the allegations of the first sentence of paragraph 3 correctly state the proof required under the second *Montana* exception, and denies that the Tribes cannot prove that the second *Montana* exception is satisfied in this case. Answering the allegations of the second sentence of paragraph 3, Defendant denies that the Tribal Court of Appeals second *Montana* exception ruling is contrary to federal law, and denies that the Tribal Court of Appeals ruled that "the Tribes only needed to show a minimal potential risk, or perceived risk, of an adverse effect on Tribal health and welfare."

4. Based upon these erroneous legal positions, the Tribal Court of Appeals found that the Tribes have jurisdiction over activities conducted on the FMC Property, and the Court imposed a Tribal Court judgment against FMC ordering FMC to pay the amount of $20,519,318.41 ("Tribal

Court Judgment"); and it also required FMC to pay the Tribes a fee of $1.5 million each year in perpetuity. This judgment is not enforceable under federal law, not only because there was no jurisdiction for the entry of this judgment, but also because the judgment is not supported by the due process of law.

ANSWER: Answering the allegations of the first sentence of paragraph 4, Defendant denies that the Tribal Court of Appeals decisions are based on erroneous legal positions; admits that the Tribal Court of Appeals found that the Tribes have jurisdiction to require FMC to obtain a waste storage permit and pay the annual permit fee; admits that the Tribal Court Judgment entered against FMC on May 16, 2014 requires FMC to pay $20,519,318.41 to the Tribes, but denies that the judgment requires FMC to pay the Tribes $1.5 million each year in perpetuity. Answering the allegations of the second sentence of paragraph 4, Defendant denies that the judgment is not enforceable under federal law, denies that there was no jurisdiction for entry of the Tribal Court Judgment and denies that the judgment is not supported by due process of law.

5. The Court should issue a declaratory judgment ruling that the Tribes do not have jurisdiction over the FMC Property, and that the Judgment issued by the Tribal Court of Appeals is void and unenforceable. The Court should also preliminarily and permanently enjoin the Tribes from taking any action to enforce the Tribal Court Judgment, demand the annual payments, or assert regulatory jurisdiction over the FMC Property.

ANSWER: Paragraph 5 is a statement of the relief sought by Plaintiffs, to which no response is required. To the extent a response is required, Defendant denies the allegations of paragraph 5.

II. JURISDICTION, VENUE, AND PARTIES

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question) because this action arises under the federal common law, as

defined by *Montana* and cases applying it. This Complaint invokes remedies under 28 U.S.C. § 2201.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 6. Answering the allegations of the second sentence of paragraph 6, Defendant admits that Plaintiff's complaint alleges that it invokes remedies under 28 U.S.C. § 2201, but denies that Plaintiff is entitled to such relief.

7. Venue is proper in this Court pursuant to 28 U.S.C. §1391 (b)(1) & (2).

ANSWER: Defendant admits the allegations of paragraph 7.

8. FMC Corporation is a Delaware corporation with its headquarters in Philadelphia, Pennsylvania. Since 1947, FMC (or its predecessors or successors) has owned in fee certain lands near Pocatello, Idaho, that straddle the eastern boundary of the Fort Hall Reservation, as delineated by the Act of June 6, 1900, 31 Stat. 692. The actions challenged, and therefore this Complaint, concern only the portion of FMC's former elemental phosphorus plant property within the exterior boundary of the Reservation (referred to herein as the "FMC Property" or the "Pocatello Plant").

ANSWER: Defendant admits the allegations of the first sentence of paragraph 8. Answering the allegations of the second sentence of paragraph 8, Defendant admits that FMC has owned certain lands near Pocatello, Idaho in fee since 1947, denies that those lands straddle the eastern boundary of the Reservation as set forth in the 1900 Act, but admits that those lands are on either side of a portion of that boundary. Defendant denies the allegations of the third sentence of paragraph 8.

9. The Shoshone-Bannock Tribes are a federally-recognized Indian tribe organized under a Constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 465

and have certain sovereign authorities over Tribal lands and members within the Fort Hall Reservation.

ANSWER: Defendant admits the allegation of paragraph 9 that the Shoshone-Bannock Tribes ("Tribes") is a federally-recognized Indian tribe organized under the Indian Reorganization Act of 1934 ("IRA"); Defendant admits that the Tribes have sovereign authority over Tribal lands and members within the Fort Hall Reservation, but denies any implication that the Tribes' sovereign authority is limited to Tribal lands and members within the Reservation.

10. The Shoshone-Bannock Tribes have clearly waived sovereign immunity in this matter by affirmatively invoking the authority of the federal courts in this and in related proceedings, and seeking to have FMC exhaust tribal remedies on the issue of whether the Tribes may assert regulatory jurisdiction over FMC.

ANSWER: Defendant denies that it has waived tribal sovereign immunity, clearly or otherwise, by the actions alleged in paragraph 10.

11. Alternatively, if it is determined by this Court that the Tribes have not waived sovereign immunity, individual officers and agents of the Tribes have exceeded the lawful authority they and the Tribes are capable of exercising under federal law as defined by *Montana.* Accordingly, they are not cloaked with the sovereign immunity of the Tribes and are subject to this Court's declaratory and injunctive powers under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908). FMC would seek leave to amend if a waiver of sovereign immunity is not found.

ANSWER: The first two sentences of paragraph 11 allege legal conclusions to which no response is required, but to the extent a response is required, denied. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the third sentence of paragraph 11, and therefore denies that allegation.

12. FMC has exhausted all remedies available in the Tribal administrative and judicial systems.

ANSWER: Defendant admits the allegations of paragraph 12 that the Plaintiff has exhausted all remedies available in the Tribal administrative and judicial systems for purposes of the exhaustion of tribal remedies doctrine under *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), but FMC has waived certain arguments by failing to timely or properly present them in the tribal fora, including its due process arguments about the structure of tribal government, undue influence of the Business Council, and based on the remarks of two appellate judges at a law school seminar at the University of Idaho Law School.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Tribes Are a Governmental Entity That Have Established Laws That the Tribes Enforce as Legal Requirements.

13. Article III, § 1 of the Constitution and Bylaws for the Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho ("Tribal Constitution") declares that the governing body of the Tribes is the Fort Hall Business Council ("Business Council"), which is vested with certain enumerated powers "subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in the Tribes' Constitution."

ANSWER: Answering the allegations of paragraph 13, Defendant admits the allegation that article III, § 1 of the Constitution and Bylaws for the Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho ("Tribal Constitution"), provides that the Business Council is the governing body of the Tribes, but asserts that article III, § 1 must be read in the context of the article in which it appears, the Tribal Constitution as a whole and applicable Tribal law;

Defendant denies that the allegations of the remainder of paragraph 13 are a quotation from article III, § 1 of the Tribal Constitution.

14. Article VI, §1(h) of the Tribal Constitution vests the Business Council with, among other things, the power to levy taxes and license fees. The Tribal Constitution expressly requires that "taxes or license fees" on "non-members doing business within the reservation" must be reviewed and approved by the Secretary of the Interior ("the Secretary"), and that "any ordinances directly affecting non-members of the reservation" must also be reviewed and approved by the Secretary.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 14, but asserts that article VI, § 1(h) must be read in the context of the article in which it appears, the Tribal Constitution as a whole, and applicable Tribal law. Defendant denies that the allegations of the second sentence of paragraph 14 accurately state the requirements of the Tribal Constitution, and asserts that article VI, §§ 1(h) and (*l*) of the Tribal Constitution must also be read in the context of the article in which those provisions appear, the Tribal Constitution as a whole, and applicable Tribal law.

15. Article VI, §1(1) of the Tribal Constitution also gives the Business Council the power "to safeguard and promote the peace, safety, morals, and general welfare of the Fort Hall Reservation by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinances directly affecting non-members of the reservation shall be subject to review by the Secretary of the Interior."

ANSWER: Defendant admits that paragraph 15 quotes the text of article VI, § 1(*l*) of the Constitution and Bylaws for the Shoshone-Bannock Tribes of the Fort Hall Reservation, which

must be read in the context of the article in which those provisions appear, the Tribal Constitution as a whole, and applicable Tribal law.

16. The Business Council adopted a Fort Hall Reservation Land Use Policy Ordinance on February 28, 1977 ("Ordinance"). The Ordinance established the Land Use Policy Commission ("LUPC"). The LUPC is "empowered and charged with the administration and enforcement of [the] Ordinance." Ordinance Art. IV, § 1.

ANSWER: Defendant admits the allegations of paragraph 16.

17. Generally, the Ordinance relates to planning and zoning issues similar to land use planning statutes adopted by other local governments throughout the State of Idaho. The Ordinance was reviewed and approved by the Regional Director of the Bureau of Indian Affairs ("BIA") on February 3, 1977 and approved by the Superintendent for the Fort Hall Agency, BIA, on March 8, 1977.

ANSWER: Answering the allegations of the first sentence of paragraph 17, Defendant admits the allegation that the Land Use Policy Ordinance ("Ordinance") relates to planning and zoning issues, but denies any implication that it relates only to those issues, and otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in that sentence, and therefore denies those allegations. Answering the allegations of the second sentence of paragraph 17, Defendant admits the allegation that the Ordinance was approved by the BIA on February 3, 1977, and by the Superintendent for the Fort Hall Agency on March 9, 1977.

18. The Tribes' LUPC designated a portion of the FMC Property for industrial use in the Tribes' 1976 Official Zoning and Land Use Map. The remainder of the FMC Property was designated as "industrial" in April 1996 and retains the "industrial" designation in the Shoshone-

Bannock Tribes Zoning and Land Use Map approved on or about January 4, 2010 (the "Official Map").

ANSWER: Answering the allegations of the first sentence of paragraph 18, Defendant admits that the maps referenced in paragraph 18 show a portion of the FMC Property to be zoned Industrial, although the FMC Property is being used for an Urban and Commercial use as that term is defined by the Fort Hall Land Use Operative Policy Guidelines ("1979 Guidelines"), and thus a special use permit is required for FMC to store waste on that land. *FMC Corp. v. Shoshone-Bannock Land Use Dep't*, Nos. C-06-0069, C-07-0017, C-07-0035, at 18-19 (Shoshone-Bannock Tribal Ct. App. June 26, 2012) (amended opinion and order) ("June 26, 2012 Amended Findings") (citing 1979 Guidelines, ch. 2, § 81). Answering the allegations of the second sentence of paragraph 18, Defendant admits that certain FMC lands were designated as industrial in 1996 and retain that designation in the 2010 map referred to in this paragraph. Defendant otherwise denies the allegations of paragraph 18.

19. On August 24, 1979, the LUPC adopted and the Business Council approved on an interim basis the Fort Hall Land Use Operative Policy Guidelines ("1979 Guidelines"). The 1979 Guidelines were effective on September 27, 1979.

ANSWER: Defendant admits that the Tribes adopted the 1979 Guidelines by resolution on August 24, 1979 and that the Guidelines became effective on November 22, 1979 "based on the non-objection of the BIA within ninety (90) days," June 26, 2012 Amended Findings at 12 (citations omitted), and otherwise denies the allegations of paragraph 19.

20. The purpose of the 1979 Guidelines is "to aid the Commission in administering and enforcing the Ordinance in a consistent and uniform manner that effectively implements the operative policy and intent of the ordinance." 1979 Guidelines Sec. 1-3. The 1979 Guidelines set

forth specific requirements for zoning the entire Reservation into agricultural, mining, industrial and commercial/residential areas. The 1979 Guidelines provide specific requirements regarding applications for permits for uses within those four designated areas.

ANSWER: Answering the allegations of the first sentence of paragraph 20, the quotation from sec. 1-3 of the 1979 Guidelines is accurate, but sections 1-3 must be read in the context of the 1979 Guidelines as a whole, amendments to the 1979 Guidelines, the Ordinance, and applicable Tribal law. Answering the allegations of the second and third sentences of paragraph 20, Defendant admits the allegation that the 1979 Guidelines address zoning and permit requirements, but denies that the second and third sentences are a complete and accurate statement of those requirements, which are set forth in full in the LUPO Guidelines.

B. As a Governmental Entity, the Tribes Demanded That FMC Obtain Tribal Permits and Threatened Actions That Would Force FMC to Permanently Shut Down the Pocatello Plant.

21. For many years, the Tribes have asserted that they have authority to regulate conduct on the FMC Property within the Reservation, where FMC operated an elemental phosphorus plant until it shut down in December 2001. In particular, the Tribes have asserted that the LUPC has authority to regulate land use at the FMC Property. Consistent with the presumption against tribal jurisdictional under *Montana,* FMC has disagreed with the LUPC's assertion of governmental authority over the FMC Property.

ANSWER: Answering the allegations of the first two sentences of paragraph 21, Defendant admits that the Tribes have asserted authority to regulate certain conduct and activities engaged in by FMC on the FMC Property, *see e.g.*, *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), and that the Land Use Policy Commission ("LUPC") has asserted authority to regulate certain conduct and activities on the FMC Property, admits that the Defendant has for many years asserted authority to require Plaintiff to obtain a permit to store

waste on the Reservation and pay the annual permit fee, and admits that FMC produced elemental phosphorus on FMC Property within the Reservation until December 2001, but denies that FMC shut down all activities at its elemental phosphorus plant in December 2001, as FMC continues to store waste on the FMC Property, at the former FMC Plant site and elsewhere. To the extent that the generality of the allegations of the first two sentences of paragraph 21 is intended to allege specific claims of Tribal authority that Plaintiff has not identified in paragraph 21, Defendant lacks knowledge or information sufficient to form a belief about the truth of such allegations, and therefore denies the allegations. Answering the allegations of the third sentence of paragraph 21, Defendant admits that the Plaintiff presently disagrees with LUPC's authority to require Plaintiff to obtain a permit to store waste on the Reservation and to pay the annual permit fee of one million five hundred thousand dollars ($1,500,000.00), but denies that it did so prior to May 28, 2002, and denies that FMC's disagreement is consistent with any part of the *Montana* decision.

22. On November 7, 1995, the Tribes filed suit against FMC in the Shoshone-Bannock Tribal Court ("Tribal Court") in relation to conversion of a landfill on the FMC Property into non-hazardous solid waste impoundment known as Pond 17 (Case Number C-95-67), claiming FMC must obtain a Special Use Permit for Pond 17 pursuant to the Ordinance. On January 18, 1996, the Shoshone-Bannock Tribal Court issued an *ex parte* order prohibiting FMC's use of Pond 17, pending a resolution of the Tribes' claims.

ANSWER: Defendant admits the allegation of paragraph 22 that the Tribes filed suit against FMC in the Shoshone-Bannock Tribal Court ("Tribal Court") on Nov. 9, 1995 arising from FMC's refusal to apply for a Special Use Permit to authorize its construction of a solid-waste landfill on the FMC Property, Complaint, *Shoshone-Bannock Tribes ex rel. Land Use*

Comm'n v. FMC Corp., No. C-95-67 (Shoshone-Bannock Tribal Ct.) ("1995 Tribal Court case"), but otherwise denies the allegations of the first sentence of paragraph 22. Defendant denies the allegations of the second sentence of paragraph 22. The January 18, 1996 Order of the Tribal Court in the 1995 Tribal Court case was not issued *ex parte*; to the contrary FMC briefed, and on November 15, 1995, argued the motion for a temporary restraining order that is the subject of the Order. Jan. 18, 1996 Order at 2, 1995 Tribal Court case. Furthermore, the January 18 Order specifically authorized FMC to undertake certain construction activities at the site, specifically preserved FMC's jurisdictional objections, and specifically stated that "[t]his order shall not be offered in evidence or referred to in argument by any party in support of, or in opposition to, any contention that the Tribes, the [Land Use Policy] Commission, or this Court possess or lack jurisdiction, except to enforce the terms of this Order." *Id.* at 3. The January 18 Order acknowledges that an *ex parte* temporary restraining order had been entered on November 9, 1995, the same day that the action was initiated, states that FMC "disputes the jurisdiction under federal law of the Shoshone-Bannock Tribes and the [Land Use Policy] Commission," and acknowledges that "FMC objects to the entry of this Order." *Id*. at 2. Furthermore, the November 9, 1995 Order in the 1995 Tribal Court case "expire[d] ten days from the date it is filed, unless renewed."

23. On April 16, 1996, the Tribes and FMC agreed to resolve the Tribal Court lawsuit. The parties' settlement agreement specifically preserved the issue of FMC's objections to the Tribes' jurisdiction over the FMC Property.

ANSWER: Defendant admits the allegations of paragraph 23. The *Agreement Between The Shoshone-Bannock Tribes Land Use Policy Commission and The FMC Corporation* (Apr. 16, 1996) ("April 16 Agreement"), resolved the action that the Tribes had brought against FMC

on November 9, 1995 on the terms set forth therein. The April 16 Agreement acknowledges that by the time the agreement was entered into that FMC had already completed construction of the landfill and implemented the waste treatment process for which the landfill was to be used. *Id*. at 1. The April 16 Agreement also recites that upon signing the agreement the Tribes were "willing to enter into discussions with FMC towards a comprehensive resolution of jurisdictional issues between the parties, including land use regulation, taxation, and other matters." *Id.* at 5-6. In addition, the parties specifically agreed that the April 16 Agreement "will not be referred to or used by any party as evidence in any administrative, judicial, or legislative proceeding in support of or in opposition to any contention concerning whether the Tribes or the Commission have jurisdiction over FMC or whether FMC consented or submitted to the jurisdiction of the Tribes or Commission for any purpose except to enforce the terms of this Agreement." *Id*. at 6-7.

24. A year later, in 1997, while FMC was negotiating a consent decree with the U.S. Department of Justice ("DOJ") and the U.S. Environmental Protection Agency ("EPA") regarding claimed violations of the federal Resource Conservation and Recovery Act ("RCRA"), the Tribes again demanded that FMC submit permit applications for operation of the new Ponds 17 and 18. The LUPC threatened to initiate suit against FMC to enjoin the Ponds' use unless FMC complied with the Tribes' permit demands.

ANSWER: Defendant admits that "[d]uring the same time frame that FMC was negotiating with the EPA [over RCRA violations], FMC and the Shoshone-Bannock Tribes were also discussing FMC's compliance with the Tribes' land use permitting regulations," and that "FMC was notified by the LUPC in August of 1997 that Amended Guidelines to the [Ordinance] would be adopted, which would address the storage of hazardous and non-hazardous waste on

the Reservation," June 26, 2012 Amended Findings at 4, but denies all other allegations of paragraph 24.

25. FMC had notified EPA and the Tribes that the existing waste disposal ponds were reaching capacity and would be full within the next year. FMC would not be able to operate its Pocatello Plant without Ponds 17 and 18, *i.e.,* additional disposal capacity was necessary for continued Plant operations.

ANSWER: Defendant admits that FMC informed the Tribes that in order to continue to operate the Pocatello Plant, FMC would need to continue to dispose of hazardous waste by storing it on the Reservation, and that FMC would need a Tribal building permit and a Tribal use permit to construct additional ponds for that purpose, but otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the first sentence of paragraph 25, and therefore denies those allegations. Answering the allegations of the second sentence of paragraph 25, Defendant admits that the disposal and storage of waste in ponds by FMC is part of the Pocatello Plant's operations, and admits that additional storage capacity was necessary for the Plant to continue to operate.

C. FMC Had No Realistic Alternative Other than to Resolve the Dispute with the Tribes in a Manner That Would Avoid Permanent Shutdown of the Pocatello Plant.

26. The Tribes' threat of further litigation and past history of issuing an *ex parte* Tribal Court order prohibiting use of facilities that were essential to operation of the Pocatello Plant forced FMC to choose between reaching a resolution with the Tribes, or contesting the Tribes' jurisdiction to require FMC obtain a permit for operation of new Ponds 17 and 18. FMC knew that Tribal and federal court litigation over the Tribes' jurisdiction would take several years. In this case, just exhausting the Tribal Court process has taken almost ten years.

ANSWER: Answering the allegations of the first sentence of paragraph 26, Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation for which no date is given that the Tribes had made a threat of further litigation and therefore denies that allegation; denies that the Tribes "had a past history of issuing *ex parte* orders prohibiting the use of facilities essential to FMC's operation of the Pocatello Plant"; and denies that the allegations of the first sentence of paragraph 26 forced FMC to chose between reaching agreement with the Tribes or challenging Tribal jurisdiction to require a Tribal permit. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the second sentence of paragraph 26 and therefore denies that allegation. Defendant denies the allegations of the third sentence of paragraph 26.

27. Although FMC vigorously disagreed with the Tribes' assertion of jurisdiction to compel compliance with the claimed permit requirement, FMC had no realistic alternative but to resolve its dispute with the Tribes in a manner that would enable continued operation of the Pocatello Plant. Failure to resolve the dispute with the Tribes could result in the issuance of Tribal Court order prohibiting FMC's use of new Ponds 17 and 18, without which the Pocatello Plant could not operate.

ANSWER: Answering the allegations of the first sentence of paragraph 27, Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation, made without reference to any date, that "FMC vigorously disagreed with the Tribes' assertion of jurisdiction to compel compliance with the claimed permit requirement," and therefore denies that allegation; Defendant denies that by requesting that FMC obtain a permit to store waste on the Reservation the Tribes had left FMC with "no realistic alternative but to resolve its dispute with the Tribes in a manner that would enable continued operation of the Pocatello Plant." Answering

the allegations of the second sentence of paragraph 27, Defendant admits that the storage of waste is part of the Pocatello Plant's operations but lacks knowledge or information sufficient to form a belief about the truth of the allegation, that "[f]ailure to resolve the dispute with the Tribes could result in the issuance of Tribal Court order prohibiting FMC's use of new Ponds 17 and 18, without which the Pocatello Plant could not operate," and therefore denies that allegation.

28. Shutdown of the Pocatello Plant, even for a relatively short time, would have resulted in permanent shutdown because FMC would have been forced to breach its long-term elemental phosphorus supply contracts and the Pocatello Plant's customers would have had to secure other phosphorus sources on a long-term contract basis. Permanent shutdown of the Pocatello Plant at that time would have caused FMC severe economic damages, including lost profits from operation of the Pocatello Plant and downstream FMC businesses, and damages awarded to third-party customers for FMC's breach of long term supply contracts. Permanent shutdown of the Pocatello Plant, and closure of the related Dry Valley Mine and Kemmerer coke plant, would have caused significant job losses and damage to the surrounding communities, including the Tribal community.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 28, and therefore denies those allegations.

29. Faced with no other commercially viable alternative, on August 1, 1997, FMC submitted applications for a Building Permit and Special Use Permit for Ponds 17, 18, and 19 (Pond 19 later became the second cell of Pond 18) that expressly reserved FMC's jurisdictional objections. Under the 1979 Guidelines, the permit fee for each permit was $10.00. 1979

Guidelines, §§ V-1-1 and V-5-1. A few days later, the LUPC notified FMC that it would not accept the permit applications because FMC had reserved its jurisdictional objections.

ANSWER: Answering the allegations of the first sentence of paragraph 29, Defendant denies that FMC lacked any "commercially viable alternative" to submitting a Building Permit and Special Use Permit application to the LUPC; Defendant admits that FMC submitted an application for a building permit on August 1, 1997 and an application for a use permit on August 11, 1997; Defendant admits that FMC attached to the application for a Building Permit a letter that stated that "[i]n submitting this application, FMC reserves its position with respect to jurisdiction over the activities of non-Indians on fee land within the boundaries of an Indian reservation, as previously expressed in the settlement of the NOSAP litigation last year. Specifically, by submitting this application, FMC does not consent to the jurisdiction of the tribes over zoning or waste regulation matters, nor does it intend to create a 'consensual relationship' (as contemplated by Montana v. United States, 450 U.S. 544 (1981)) with the Tribes," Letter from Sheila G. Bush, FMC Counsel to Candy Jackson, Tribal Attorney (Aug. 1, 1997) ("August 1 Bush Letter"); Defendant denies that the August 1 Bush Letter reserved FMC's jurisdictional objections with respect to FMC's application for a use permit, which application was not filed until August 11, 1997. Defendant denies the allegations of the second sentence of paragraph 29, but admits that under the 1979 Guidelines the application fee for a Building Permit was ten dollars ($10.00) and that the application fee for a Use Permit was ten dollars ($10.00). Answering the allegations of the third sentence of paragraph 29, Defendant admits that the LUPC informed FMC on August 6, 1997 that FMC's application for a building permit for Ponds 17, 18 and 19 could not be accepted with the August 1 Bush Letter attached to it because, as the letter explained, LUPC "understood" that as a result of the "'FMC Initiative'" and a "July 10,

1997 [meeting] with FMC, EPA, and Tribal officials," "FMC would recognize tribal jurisdiction within the exterior boundaries of the Fort Hall Indian Reservation." Letter from Tony Galloway, Chairman, LUPC to Dave Buttelman, Health, Safety and Environmental Manager, FMC (Aug. 6, 1997).

30. Again, FMC had no commercially viable choice but to re-submit the application. Rather than risk closure of the Pocatello Plant and breach long-term supply contracts, FMC delivered a revised letter to the LUPC, dated August 11, 1997, in which FMC removed the reservation of the jurisdictional objection, and offered to abide by the "zoning and permitting requirements as specified in the *current* Fort Hall Land Use Operative Policy Guidelines" (emphasis added), which provided for a $10 permit fee.

ANSWER: Answering the allegations of the first sentence of paragraph 30, Defendant denies the allegation that "FMC had no commercially viable choice but to re-submit the application," and denies that this was the case "again." Answering the allegations of the second sentence of paragraph 30, Defendant admits the allegation that Plaintiff delivered a letter to the LUPC on August 11, 1997 that consented to Tribal jurisdiction, but denies the characterization of that letter alleged in this sentence and denies that the permit fee was ten dollars ($10.00), but admits that the application fee was ten dollars ($10.00); Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation that FMC delivered the August 11, 1997 Letter "[r]ather than risk closure of the Pocatello Plant and breach long-term supply contracts," and therefore denies that allegation.

31. On August 22, 1997, the LUPC advised FMC that it had adopted, or was proposing to adopt, amended Guidelines imposing new, more onerous permit fees with a proposed rate of $100.00 per ton of hazardous waste stored, treated, or disposed of on the

property and $50.00 per ton of non-hazardous waste. FMC calculated that the annual Tribal permit fee would have been $182,000,000 per year. The LUPC's August 22, 1997 communication did not accept FMC's offer to abide by the requirements of the Fort Hall Land Use Operative Policy Guidelines in effect as of August 11, 1997. Instead, the Tribes demanded that FMC obtain a Tribal permit that would require FMC to pay hundreds of millions of dollars annually.

ANSWER: Answering the allegations of the first sentence of paragraph 31, Defendant admits that the LUPC informed FMC in August of 1997 that proposed amendments to the Fort Hall Land Use Operative Guidelines would be considered, and that amendments were proposed that provided for a fee of one hundred dollars ($100.00) a ton for hazardous waste and fifty dollars ($50.00) a ton for non-hazardous waste, but denies the characterization of those proposed amendments that is alleged in this sentence. Answering the allegations of the second sentence of paragraph 31, Defendant admits that FMC alleged that the proposed amendments would have imposed a permit fee of one hundred and eighty-two million dollars ($182,000,000) but lacks knowledge or information sufficient to form a belief about the truth of that allegation, and therefore denies it. Defendant denies the allegations of the third sentence of paragraph 31 that "[t]he LUPC's August 22, 1997 communication did not accept FMC's offer to abide by the requirements of the Fort Hall Land Use Operations Guidelines in effect as of August 11, 1997" because that allegation incorrectly characterizes FMC's letter of August 11, 1997, as the August 1 Bush Letter reserved jurisdictional objections only for the Building Permit, and because FMC's letter of August 11 consented to jurisdiction without otherwise reserving FMC's rights, as the Tribal Court of Appeals held. 2012 TCA Op. at 14-15. Defendant denies the allegations of the last sentence of paragraph 31.

32. In an effort to reach some accommodation with the Tribes that would permit uninterrupted operation of the Pocatello Plant, FMC continued discussions with the Tribes into 1998. On April 13, 1998, the LUPC sent FMC a letter which addressed FMC's August 11, 1997 permit applications and again proposed to change the rules and rates, pursuant to a new temporary Amendment to Chapter V of the 1979 Guidelines ("April 1998 temporary Amendments"). The April 13, 1998 letter conditionally approved FMC's permit applications and set forth several environmental conditions for operation of the Ponds, such as requiring an "electronic leak monitoring system" and fencing to protect animals and migratory birds. The April 13, 1998 temporary Amendments provided an annual rate of $3.00 per ton of hazardous waste and $1.00 per ton of non-hazardous waste.

ANSWER: Answering the allegations of the first sentence of paragraph 32, Defendant admits that "FMC continued discussions with the Tribes into 1998" and that this was done "[i]n an effort to reach an accommodation," but lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of the first sentence concerning FMC's objectives in those discussions and therefore denies those allegations. Answering the allegations of the second sentence of paragraph 32, Defendant admits that LUPC sent a letter to FMC on April 13, 1998 that addressed FMC's August 11, 1997 permit applications, Letter from LUPC to Paul Yochum, FMC (Apr. 13, 1998), admits that the August 13 letter from LUPC states that FMC's Building and Special Use Permits "shall be approved" on conditions that included FMC's adherence to "the amendments to V-9-1 of the Hazardous Waste siting fee of the Fort Hall Operative Guideline (Temporary)" and "Chapter V Section V-9-2 Hazardous and Non-Hazardous waste disposal fee," *id*. at 1-2, but denies the characterization of the August 13 letter

alleged in the remainder of this sentence. Defendant admits the allegations of the third and fourth sentences of paragraph 32.

33. On May 18, 1998, unbeknownst to FMC, the LUPC purported to adopt yet another, materially different version of amendments to Chapter V of the 1979 Guidelines ("May 1998 Chapter V Amendments") regarding the disposal and storage of hazardous and non-hazardous waste on the Fort Hall Reservation. The new May 1998 Chapter V Amendments provided for annual hazardous waste siting fees, and established a new annual permit fee of $5.00 per ton of hazardous waste generated, treated, stored or disposed on the Reservation. These Amendments also defined "storage" to include waste placement "for a perpetual period of time." This definition made all the wastes present at the Pocatello Plant, including those in a permanent disposal unit, subject to an annual "storage" fee and not a onetime "disposal" fee.

ANSWER: Answering the allegations of the first sentence of paragraph 33, Defendant denies the allegation that the LUPC "purported" to adopt the May 1998 Chapter V Amendments on May 18, but admits that those amendments were approved and became effective on that date; Defendant lacks knowledge or information sufficient to form a belief about the allegation that the adoption of those amendments was "unbeknownst to FMC" and therefore denies that allegation; Defendant admits that those amendments addressed, *inter alia*, "the disposal and storage of hazardous and non-hazardous waste on the Fort Hall Reservation." Defendant admits the allegations of the second sentence of paragraph 33. Defendant admits that the amendments define "storage" but denies that the third sentence of paragraph 33 accurately recites that definition. Defendant admits the allegations of the fourth sentence of paragraph 33, but denies that the wastes present on the FMC Property were subject to only a "onetime" disposal fee before the amendments were adopted.

34. Neither the April 1998 temporary Amendments nor the May 1998 Chapter V Amendments were ever approved by the Business Council, BIA, or the Secretary.

ANSWER: Answering the allegations of paragraph 34, Defendant denies the assumption that the April 1998 temporary Amendments and the May 1998 Chapter V Amendments required the approval of the Business Council, BIA, or the Secretary as the LUPC has delegated authority to amend the 1979 Guidelines without further approval of the Business Council, BIA or the Secretary; furthermore, the April 1998 temporary Amendments were not adopted by the LUPC; and finally, the May 1998 Chapter V Amendments were adopted by the LUPC but as stated above approval of those guidelines by the Business Council, BIA, or the Secretary was not required for the amendments to be effective.

35. In May 1998, faced with the Tribes' continued assertions of governmental authority, rather than shut down the Pocatello Plant, breach long-term supply contracts, and face irreversible financial damages, FMC resolved the Tribes' threatened claims for hazardous and non-hazardous wastes permits and fees by an agreement between FMC and the Tribes to incorporate permit fees specific to the Pocatello Plant into the framework of the Tribes' April 1998 temporary Amendments. The resolution with the Tribes triggered a series of letters. Those letters included a May 19, 1998 letter from the LUPC to FMC; a May 26, 1998 letter from FMC to the LUPC; and a June 2, 1998 letter from FMC to the LUPC's counsel (hereinafter the "1998 Compliance Correspondence").

ANSWER: Answering the allegations of the first sentence of paragraph 35, Defendant admits that in May 1998, the Plaintiff agreed to obtain a waste storage permit from Defendant and pay an annual permit fee of $1.5 million, but denies that the alternative to that agreement was for FMC to shut down the Pocatello Plant, and denies the remainder of the first sentence,

which misstates and inaccurately characterizes the agreement between FMC and the Tribes, which FMC entered into voluntarily, and by which FMC consented to Tribal jurisdiction. Defendant admits the allegations of the second sentence of paragraph 35. Answering the allegations of the third sentence of paragraph 35, Defendant admits that the letters triggered by FMC's resolution with the Tribes included the three letters referred to in that sentence as the "1998 Compliance Correspondence," but denies that those letters are the only documents or evidence of the agreement between the FMC and the Tribes.

36. The 1998 Compliance Correspondence provided that: (a) FMC would pay $1.5 million annually beginning on June 1, 1998; (b) FMC would make a one-time "start-up" payment of $1.0 million; (c) the Tribes would formally adopt an ordinance capping FMC's total fee payments for all hazardous and non-hazardous waste activities at $1.5 million per year; and (d) that "the various conditions concerning operation of the ponds, as set forth in your [LUPC's] April 13, 1998 letter, and the Attached Amended Guidelines, are being discussed by representatives of the Tribes, the EPA, the U.S. Department of Justice and FMC in connection with resolution of environmental issues at the plant." The 1998 Compliance Correspondence contains no recitation of consideration for the permit fee and no provisions limiting FMC's termination of the fee payment.

ANSWER: Defendant denies that the allegations of the first sentence of paragraph 36 correctly recite the terms of the agreement set forth in the "1998 Compliance Correspondence." Answering subpart (a) of the first sentence, Defendant admits that FMC agreed to pay the Tribes a $1.5 million permit fee annually in lieu of the hazardous and non-hazardous waste fees established in the May 1998 Chapter V amendments to the LUPO Guidelines, and asserts that FMC agreed to make these payments "even if the use of ponds 17-19 was terminated in the next

several years," Letter from Paul McGrath, FMC to Jeanette Wolfley, LUPC (June 2, 1998). Defendant admits the allegations of subpart (b) of the first sentence, and asserts that the start up payment referred to was "a one time start up . . . grant to the Hazardous Waste Program," as shown by the May 19, 1998 Letter from LUPC to Paul McGrath, FMC. Defendant denies the allegations of subpart (c) of the first sentence, which misstates the terms of the agreement set forth in the "1998 Compliance Correspondence," as shown by the May 19, 1998 Letter from LUPC to Paul McGrath, FMC. Answering the allegations of subpart (d) of the first sentence, Defendant admits that the Letter from Paul McGrath, FMC to the LUPC (May 26, 1998) contains the language quoted in part (d), but denies that the quoted language was a part of the agreement set forth in the "1998 Compliance Correspondence." Defendant denies the allegations of the second sentence of paragraph 36.

37. The Tribes then dropped their demand to include environmental requirements in the Tribal permits and EPA proceeded to determine the environmental requirements applicable to the Pocatello Plant. Resolution of the environmental issues between EPA and FMC under RCRA culminated with a court-approved RCRA Consent Decree entered by the U.S. District Court, over the Tribes' objection, on July 13, 1999 and affirmed by the Ninth Circuit Court of Appeals on July 7, 2000. *See United States v. FMC Corporation,* 229 F.3d 1161 (9th Cir. 2000) (unpublished opinion).

ANSWER: Answering the allegations of the first sentence of paragraph 37, Defendant denies that the Tribes did not expect FMC to comply with otherwise applicable environmental requirements at the FMC Property, whether imposed by the Tribes or EPA, after FMC agreed to obtain a waste storage permit from the Tribes and pay the annual permit fee of one million five hundred thousand dollars ($1,500,000.00), which FMC agreed to pay in lieu of the hazardous

and non-hazardous waste fees established in the May 1998 Chapter V amendments to the LUPO Guidelines; Defendant denies the characterization of FMC's agreement with the Tribes and of subsequent events contained in Plaintiffs allegation that "the Tribes then dropped their demand to include environmental requirements in the Tribal permits and EPA proceeded to determine the environmental requirements applicable to the Pocatello Plant"; Defendant admits that EPA applied environmental requirements to the Pocatello Plant, but denies that is all EPA did, as the RCRA Consent Decree also required, *inter alia*, that FMC obtain tribal permits necessary to implement the Consent Decree, and FMC agreed to do so in the Consent Decree. Defendant denies that the environmental issues between EPA and FMC were resolved by the RCRA Consent Decree, but admits the allegations of the remainder of the second sentence of paragraph 37.

38. FMC paid the $1.0 million "start up" payment and the $1.5 million annual fee to the Tribes in 1998 and 1999. Subsequently, FMC sold its phosphorus business to Astaris LLC, which paid the annual permit fee in 2000 and 2001. The Pocatello Plant was shut down in December 2001. Total payments to the Tribes by FMC and Astaris for the years 1998 through 2001 were $7.0 million.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 38, by which FMC again consented to Tribal jurisdiction. Defendant admits that the annual permit fee was paid in 2000 and 2001, and asserts that this was done at FMC's direction pursuant to FMC's agreement with the Tribes; Defendant otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations of the second sentence of paragraph 38, and therefore denies those allegations. Defendant admits that the Pocatello Plant stopped producing phosphorus in December 2001, but denies that the Plant was shut down in 2001, as FMC

continues to store waste on the FMC Property which is part of the Plant's operations. Defendant admits that total payments to the Tribes for the years 1998 through 2001 were seven million dollars ($7,000,000.00), but lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of the fourth sentence of paragraph 38 and therefore denies those allegations.

39. In 2002, FMC acquired 100-percent ownership of Astaris LLC and subsequently changed the name to FMC Idaho LLC, which continues to own the FMC Property.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 39, and therefore denies those allegations.

40. Beginning with the Pocatello Plant shutdown in 2001 and reaching completion in 2006, FMC decommissioned, dismantled and removed nearly 100% of the buildings and structures located within the Pocatello Plant operating areas. FMC no longer operates a plant on the FMC Property, and remains focused on remediating the property pursuant to EPA direction.

ANSWER: Answering the allegations of the first sentence of paragraph 40, Defendant denies that FMC's Pocatello Plant shutdown began in 2001 and that the alleged shutdown reached completion in 2006 as FMC continues to store waste on the FMC Property which is part of the Plant's operations, and denies that FMC has decommissioned, dismantled and removed nearly 100% of the buildings and structures located within the Pocatello Plant operating area, which structures include the Ponds which FMC continues to use to store waste. Answering the allegations of the second sentence of paragraph 40, Defendant admits that FMC no longer produces phosphorus at the FMC Plant on the FMC Property but lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of the second sentence of paragraph 40, and therefore denies those allegations.

41. After the Pocatello Plant shutdown, FMC sent a letter dated May 23, 2002 to the Tribes advising that because the Plant was no longer in operation, it would not make a payment for the annual permit fee to the Tribes in June 2002 or in subsequent years. FMC's letter enclosed a legal analysis explaining that the Tribes had failed to codify the fee provisions, as required in the 1998 Compliance Correspondence, and that the permit fee applied only to the one-time act of "disposal" of generated waste, not the ongoing presence of waste after disposal. After the Pocatello Plant shut down in December 2001, no phosphorus manufacturing waste disposal has occurred.

ANSWER: Defendant denies the allegation of the first sentence of paragraph 41 that the Pocatello Plant had shut down before May 23, 2002, and denies the remainder of the allegations in that sentence, which mischaracterize the May 23, 2002 letter. Answering the allegations of the second sentence of paragraph 41, Defendant admits that an attachment to FMC's letter of May 23, 2002 to the Tribes set forth "Legal Comments" concerning the "Tribal Waste Fee," but denies that the second sentence accurately describes those comments, denies that it was necessary for the Tribes to codify FMC's agreement to obtain a waste storage fee and pay the annual permit fee under the 1998 Compliance Correspondence or otherwise, denies that "the permit fee applied only to the one-time act of 'disposal' of generated waste, not the ongoing presence of waste after disposal," and asserts that in any event the "Legal Comments" did not challenge the Tribes' jurisdiction. Answering the allegations of the third sentence of paragraph 41, Defendant denies that the Pocatello Plant shut down in December 2001, admits that the plant stopped producing phosphorus in December 2001, and denies that no phosphorus manufacturing waste disposal has occurred since December 2001.

42. The LUPC issued a Notice of Violation to FMC dated December 19, 2002 regarding non-payment of the $1.5 million fee that FMC and Astaris had formerly paid.

ANSWER: Defendant admits the allegations of paragraph 42 that the LUPC issued a Notice of Violation to FMC on December 19, 2002 but denies that the remainder of paragraph 42 accurately characterizes that Notice of Violation.

D. Before Being Vacated By the Ninth Circuit, an Order From the District of Idaho Required FMC to Apply For Tribal Permits.

43. On September 19, 2005, as FMC neared completion of the RCRA Consent Decree work and was winding up the final steps in the Pocatello Plant dismantling, the Tribes filed a motion in the U. S. District Court asking, among other things, that the District Court enter an order directing FMC to apply for and obtain Tribal permits for work that the RCRA Consent Decree required FMC to conduct. The Tribes also sought confirmation of their "authority" to conduct inspections, monitor work, and demand documentation to "protect the health and welfare of Tribal members and Reservation residents."

ANSWER: Answering the allegations of the first sentence of paragraph 43, Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation that on Sept. 19, 2005 FMC was "near[ing] completion of the RCRA Consent Decree work, and winding up the final steps of the Pocatello Plant dismantling," and therefore denies those allegations; Defendant admits that on September 19, 2005, the Tribes filed a Motion for Clarification of Consent Decree, *United Sates v. FMC Corp.*, No. CV-98-0406-E-BLW, 2006 WL 544505 (D. Idaho Mar. 6, 2006), *rev'd* 531 F.3d 813 (9th Cir. 2008), in this Court that sought an order requiring that (1) FMC obtain all required Tribal permits for activities conducted on the FMC site, (2) FMC allow Tribal representations access to the FMC site to conduct on-site inspections of FMC's work and monitor FMC's compliance with the Consent Decree, and (3)

FMC provide the Tribes with documentation of FMC's work at the FMC site in accordance with the Consent Decree, but denies the characterization of that motion that appears in the remaining allegations of paragraph 43.

44. FMC argued, among other things, that the Tribes lacked jurisdiction under *Montana,* that no Tribal permits applied to FMC's activities, and therefore, no Tribal permits were required.

ANSWER: Defendant admits the allegations of paragraph 44.

45. The District Court issued an Order on March 6, 2006 ("March 6, 2006 Order") that compelled FMC to submit applications to the LUPC for a Special Use Permit and a Building Permit, and directed FMC to make any challenges to the applicability of the permits in the Tribal administrative process. Recognizing the doctrine of exhaustion of tribal remedies under *National Farmers Union v. Crow Tribe,* 471 U.S. 845 (1985), the District Court stated, "FMC may make its challenges to the applicability of the permits in the Tribal administrative process, and must exhaust that process, or identify a legal exception to the exhaustion doctrine, before seeking relief in this Court." March 6, 2006 Order, pp. 4, 17.

ANSWER: Defendant admits the allegations of paragraph 45, but denies that those allegations describe the March 6, 2006 Order in its entirety, and denies that those allegations accurately characterize the March 6, 2006 Order, or the basis of that ruling.

46. The District Court also rejected FMC's jurisdictional objection, ruling that there was sufficient tribal jurisdiction under the "consensual relationship" exception of *Montana* to require exhaustion of FMC's remedies in the Tribal courts. The District Court found sufficient jurisdiction to require exhaustion on three bases: (a) the August 11, 1997 letter from FMC to the Tribes; (b) the 1998 Compliance Correspondence; and (c) the RCRA Consent Decree itself.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 46, but denies that those allegations describe the March 6, 2006 order in its entirety, and denies that those allegations accurately characterize the March 6, 2006 Order, or the basis of that ruling. Defendant admits that this Court's March 6, 2006 Order relied on the documents cited in the second sentence of paragraph 45, but denies that the District Court's ruling relied on only those documents.

E. The Tribes' LUPC and Business Council Mandated That FMC Pay Money to the Tribes.

47. FMC appealed the District Court's March 6, 2006 Order to the Ninth Circuit Court of Appeals. While the District Court's Order was on appeal, without waiving its position that the Tribes lacked jurisdiction and without prejudice to FMC's appeal of the District Court's March 6, 2006 Order, FMC complied with the federal court's directive to exhaust Tribal remedies by filing applications for a Special Use Permit and a Building Permit (the "Applications") with the LUPC.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 47. Answering the allegations of the second sentence of paragraph 47, Defendant admits that the Plaintiff filed an application for a Special Use Permit and a Building Permit with the LUPC, but those applications were transmitted on March 20, 2006, before FMC appealed this Court's March 6, 2006 Order; Defendant admits that FMC asserted that in filing these applications it was preserving its objection to Tribal jurisdiction, but denies that FMC had any basis for doing so, as it had already consented to Tribal jurisdiction, and otherwise denies the allegations of the second sentence of paragraph 47, including the allegation that by filing applications for a Special Use Permit and a Building Permit FMC had complied with the federal court's directive to exhaust

Tribal remedies, as the filing of the applications was only one step in the Tribal permitting process.

48. FMC's application for a Special Use Permit was for industrial and related activities in an area the Tribes had classified for industrial use. The Special Use Permit application included an attached exhibit that objected to the Tribes' jurisdiction, objected to the necessity for a Special Use Permit for an industrial use in an industrial zone, objected to a Special Use Permit for storage, treatment and disposal of hazardous waste, and provided a narrative statement regarding FMC's activities.

ANSWER: Answering the allegations of the first sentence of paragraph 48, Defendant admits that FMC's application for a Special Use Permit describes the proposed special use for which FMC was applying as "Industrial and related," but denies that allegation is correct; Defendant admits that the area for which the permit was sought had been classified for industrial use; Defendant denies all remaining allegations of the first sentence of this paragraph. Defendant admits the allegations of the second sentence of paragraph 48, but denies that the objections referred to in the allegations of the second sentence had legal merit, as FMC had previously agreed to obtain a Special Use Permit from the Tribes and by that agreement consented to Tribal jurisdiction.

49. The Building Permit application included an attached exhibit that objected to jurisdiction, objected to a Building Permit for demolition activities given the definition of "construction" in the Ordinance, and objected to the requirement that FMC obtain a permit for buildings and assets which, at that point, it had sold to a third party for demolition and removal from the FMC Property.

ANSWER: Defendant admits the allegations of paragraph 49, but denies that the objections referred to in the allegations of the second sentence of paragraph 49 had legal merit, as FMC had previously agreed to obtain a Building Permit from the Tribes and by that agreement consented to Tribal jurisdiction.

50. On April 25, 2006, the LUPC issued its Permit decisions. The LUPC's Special Use Permit decision granted FMC "a Special Use Permit for the disposal and storage of waste at the FMC Pocatello Plant." The Special Use Permit Decision also imposed an annual permit fee of $1.5 million, but provided that if FMC failed to "acknowledge" the alleged "agreement" from 1998 upon which that fee was based, the much higher fee schedule of the 1979 Guidelines, "as amended," would apply. The Special Use Permit did not contain any substantive environmental provisions.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 50. Defendant admits that the LUPC's Special Use Permit Decision granted FMC a Special Use Permit, but denies that the allegations of the second sentence of paragraph 50 accurately describe that Decision, which granted the permit "subject to the requirements and conditions set forth [in the Decision]." *Id.* at 4. Answering the allegations of the third sentence of paragraph 50, Defendant denies that the Special Use Permit Decision imposed an annual permit fee of $1.5 million, but admits that the Decision recognized that the Tribes and FMC had agreed on an annual permit fee of $1.5 million in 1998, and that the Decision required that it be paid; Defendant denies the characterization of the Special Use Permit Decision that is alleged in the remainder of the third sentence, but admits that the Decision provides that "[i]n the event that FMC does not acknowledge the 1998 agreement, the permit fee will be calculated according to the Tribes [sic] land use laws and regulations, including the formula set forth in the Land Use

Policy Operative Guidelines, as amended." *Id.* at 5. Defendant denies the allegations of the fourth sentence of paragraph 50.

51. The LUPC's Building Permit decision granted FMC a Building Permit upon the condition that FMC pay a fee of $3,000.

ANSWER: Defendant admits that the LUPC's Building Permit decision granted FMC a Building Permit upon the condition that FMC pay a fee of $3,000, but denies that the permit fee was the only condition on which the permit was granted.

52. Both of the LUPC's Permit decisions relied upon the District Court's March 6, 2006 Order to conclude that the Tribes have jurisdiction over FMC. Referencing only the three points from the District Court's reasoning, the Permit decisions stated that FMC established a "consensual relationship" with the Tribes by operation of: (a) the August 11, 1997 letter from FMC to the Tribes; (b) the 1998 Compliance Correspondence; and (c) the RCRA Consent Decree itself.

ANSWER: Answering the allegations of the first sentence of paragraph 52, Defendant admits that that the LUPC Decisions on the Special Use Permit and the Building Permit relied on this Court's March 6, 2006 Order in holding that the Tribes have jurisdiction to require FMC to obtain those Permits and pay the permit fees, but denies that was the sole basis for those rulings. Answering the allegations of the second sentence of paragraph 52, Defendant admits that the LUPC Decisions on the Special Use Permit and the Building Permit relied on the documents referenced in the second sentence, but denies that those decisions relied only on those documents and "the three points from the District Court's reasoning" in holding that FMC had established a consensual relationship with the Tribes.

53. The LUPC also asserted jurisdiction under the second *Montana* exception by claiming that FMC's activities have a direct impact on the political integrity, economic security, and health and welfare of Tribal members and residents of the Fort Hall Reservation. The Permit decisions cited no facts or evidence to support this conclusion.

ANSWER: Defendant admits that the LUPC Decisions on the Special Use Permit and the Building Permit hold that "the activities of FMC Corporation at the Pocatello plant are conducted within the exterior boundaries of the Fort Hall Reservation and that such activities have a direct impact on the political integrity, economic security, and health and welfare of Tribal members and residents of the Fort Hall Reservation," Special Use Permit Decision at 4; Building Permit Decision at 2-3, but denies that these decisions simply "claim" such jurisdiction. Defendant denies the allegations of the second sentence of paragraph 53, as the Special Use Permit and Building Permit decisions show on their face that a public hearing on FMC's permit applications was held on April 18, 2006, at which an FMC representative and FMC counsel appeared, that FMC's counsel provided comments on the application, and that the LUPC also reviewed and considered written comments and documents, including documents and affidavits submitted by FMC and others to this Court in *United States v. FMC Corp*., Case No. CIV-98-0406-E-BLW.

54. As authorized by Tribal law, FMC appealed the Permit decisions to the Business Council. On July 21, 2006, the Business Council affirmed the LUPC's decisions regarding the Special Use and Building Permits and on June 14, 2007 it affirmed the LUPC's decision to set the fee at $1.5 million, relying exclusively on the same matters as the LUPC.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 54. Defendant admits the allegations of the second sentence of paragraph 54 except the allegation

that the Business Council decisions "rel[ied] exclusively on the same matters as the LUPC," which Defendant denies.

F. The Tribal Court Relied on the District Court For a Finding of Tribal Jurisdiction, But Ruled That the Laws Asserted by the Tribes Had Not Been Validly Enacted.

55. FMC timely appealed the Business Council's determinations to the Tribal Court, filing a Verified Complaint for Review for the Business Council's and LUPC's decisions.

ANSWER: Answering the allegations of paragraph 55, Defendant admits that FMC appealed the Business Council's decisions of June 14, 2007, and July 21, 2006 by filing verified complaints for review of those decisions, but denies that the verified complaints also appealed the LUPC decisions.

56. On September 14, 2006, the Business Council and LUPC filed an Answer and Counterclaim. On October 1, 2006, the Business Council and LUPC filed an Amended Counterclaim, alleging two causes of action: Breach of Contract, and Failure to Obtain Tribal Air Permit.

ANSWER: Answering the allegations of paragraph 56, Defendant admits that the Business Council and LUPC filed an Answer and Counterclaim on Sept. 14, 2006, and an Amended Counterclaim on October 2, 2006, both of which answered and counterclaimed with respect to FMC's complaint for review of the Business Council's decision of July 21, 2006.

57. On October 16, 2006, FMC filed a Motion to Dismiss the Amended Counterclaims based upon three grounds: (a) the counterclaims could not be made in the context of an administrative appeal under the Ordinance; (b) the Tribes lacked jurisdiction over FMC under federal law, and thus, the Tribal Court lacked subject matter jurisdiction over the counterclaims; and (c) the breach of contract counterclaim was time-barred under the three-year statute of limitations set forth in Section 3.64 of the Tribal Law and Order Code.

ANSWER: Defendant admits the allegations of paragraph 57.

58. Notwithstanding the District Court's dismissal under the exhaustion of tribal remedies doctrine, the Tribal Court found that the Tribes had jurisdiction over FMC based entirely on the District Court's statements regarding jurisdiction. The Tribal Court made no independent findings of fact or conclusions of law on the jurisdictional issue.

ANSWER: Answering the allegations of the first sentence of paragraph 58, Defendant admits that the Tribal Court issued a decision holding that the Tribes have jurisdiction over FMC, but denies that the decision so held "[n]otwithstanding the District Court's dismissal under the exhaustion of tribal remedies doctrine," and denies that the Tribal Court's decision was based entirely on the District Court's statements regarding jurisdiction. Defendant denies the allegations of the second sentence of paragraph 58.

59. On November 13, 2007, the Tribal Court issued its Opinion dismissing the Tribes' breach of contract counterclaim. The Tribal Court correctly ruled, as a matter of law, that the 1998 Compliance Correspondence "never took on the attributes of a contract" but rather that the 1998 Compliance Correspondence "was nothing more than an agreement to incorporate the 'permitting fees' into the statutory framework of the ordinance."

ANSWER: Defendant admits the allegations of the first sentence of paragraph 59. Answering the allegations of the second sentence of paragraph 59, Defendant denies that the Tribal Court's November 13, 2007 ruling correctly dismissed the Tribes' breach of contract counterclaim, and denies that the second sentence accurately characterizes that ruling.

60. The Tribal Court issued its final decision on May 21, 2008. Tribal Court Judge David Maguire, a respected Idaho attorney specially appointed to the Tribal Court to preside over the FMC case, expressly rejected the Tribes' arguments that legal authority for $1.5 million

fee could be based upon the unapproved and newly-disclosed May 1998 Chapter V Amendments and a draft "Hazardous Waste Management Act" issued for public comment in 2003.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 60. Answering the allegations of the second sentence of paragraph 60, Defendant admits that "David Maguire [is] a respected Idaho attorney specially appointed to the Tribal Court to preside over the FMC case;" denies the characterization of the Tribal Court's May 21, 2008 decision that is alleged in this sentence; denies that the May 1998 Chapter V Amendments were "unapproved and newly-disclosed;" admits that the Tribal Court held that the $1.5 million fee was not lawfully imposed on FMC under the May 1998 Chapter V Amendments or the Hazardous Waste Management Act; and denies the remaining allegations of the second sentence of paragraph 60.

61. FMC calculated that, applying the $5.00 per ton annual fee amount to the broad category of wastes that the May 1998 Chapter V Amendments defined as "hazardous," the annual Tribal permit fee amount would have been approximately $110 million per year.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 61, and therefore denies those allegations.

62. The Tribal Court also concluded that a Special Use Permit was not required under the Ordinance for FMC to conduct industrial activities in an Industrial Zone. The Tribal Court upheld the Building Permit requirement based upon its interpretation of the term "construction" in the Ordinance.

ANSWER: Defendant admits the allegations of paragraph 62.

G. The Ninth Circuit Reversed and Vacated the District of Idaho's Order.

63. On June 27, 2008, after the Tribal Court rendered its May 21, 2008 final decision, the Ninth Circuit issued its Opinion in FMC's appeal of the March 6, 2006 Order from the District Court and vacated the District Court's March 6, 2006 Order in its entirety, holding

that the Tribes were not a third-party beneficiary of the RCRA Consent Decree and therefore lacked standing to bring a claim seeking to enforce it. *United States v. FMC Corp.,* 531 F.3d 813, 815 (9th Cir. 2008). Vacated decisions "have no precedential effect whatsoever." *Durning v. Citibank NA.,* 950 F.2d 1419, 1424 n 2 (9th Cir. 1991). Such decisions function as if there had been no legal decision in the first place. *See also United States v. Munsingwear,* 340 U.S. 36, 40 (1950) (vacating a judgment "clears the path for future re-litigation of the issues between the parties and eliminates a judgment").

ANSWER: Defendant admits the allegations of the first sentence of paragraph 63, except the allegation that the Ninth Circuit "vacated the District Court's March 6, 2006 in its entirety," which mischaracterizes that ruling and is accordingly denied. The last two sentences of paragraph 63 allege conclusions of law to which no response is required, but if a response is required, Defendant denies that these two sentences accurately characterize the effect of the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. FMC Corp*., 531 F.2d 813 (9th Cir. 2008), on this Court's March 6, 2006 ruling.

64. Since the Tribal Court relied solely on the District Court's March 6, 2006 Order for its finding of tribal jurisdiction, the Ninth Circuit's vacation of the District Court's Order in its entirety eliminated the only basis upon which the Tribal Court had found tribal jurisdiction.

ANSWER: Answering the allegations of paragraph 64, Defendant denies that the Tribal Court's decision relied solely on the District Court's March 6, 2006 Order for its finding of tribal jurisdiction, denies the allegation that the Ninth Circuit vacated the District Court's Order in its entirety because it mischaracterizes the Ninth Circuit's decision, and denies that the Ninth Circuit decision eliminated the only basis upon which the Tribal Court had found tribal jurisdiction.

H. The Tribal Court of Appeals Ignored United States Law in Issuing a Final Order Requiring FMC to Make Payments to the Tribes.

65. The LUPC and Business Council filed an appeal to the Tribal Court of Appeals on May 27, 2008, assigning error to the Tribal Court's November 13, 2007 Opinion and May 21, 2008 Opinion. FMC filed a cross-appeal assigning error to the failure to rule that the Tribes lack jurisdiction over FMC, and other decisions.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 65. Defendant admits the allegations of the second sentence of paragraph 65.

66. The Tribal Court of Appeals entered its Findings of Fact and Conclusions of Law on May 8, 2012 ("May 8, 2012 Findings and Conclusions"), finding that the Tribes had jurisdiction over FMC under the first *Montana* exception based on the same three bases relied upon by the District Court in the vacated opinion: (a) the August 11, 1997 letter; (b) the 1998 Compliance Correspondence; and (c) the RCRA Consent Decree. The May 8, 2012 Findings and Conclusions were virtually identical to proposed findings of fact and conclusions of law submitted by the LUPC and Business Council.

ANSWER: Answering the allegations of the first sentence of paragraph 66, Defendant denies the allegations concerning the May 8, 2012 decision of the Tribal Court of Appeals because that decision was superceded *nunc pro tunc* by the June 26, 2012 decision (as Plaintiff alleges in paragraph 67), admits that the superceded May 8, 2012 decision determined that the Tribes had jurisdiction over FMC under the first *Montana* exception and relied on the documents identified in this sentence in so holding, but denies that those documents were the only basis of the ruling, and denies that those documents were the only basis of this Court's March 6, 2006 opinion. Defendant denies the allegations of the second sentence of paragraph 66 to the extent it

purports to allege that the May 8, 2012 decision did not represent the opinion of the judges of the Tribal Court of Appeals.

67. On June 7, 2012, the Tribes filed a motion seeking to correct problems with the May 8, 2012 Findings and Conclusions. On June 22, 2012, FMC filed its Response requesting the Tribal Court of Appeals to supplement the record and amend the May 8, 2012 Findings and Conclusions. On June 26, 2012, the Tribal Court of Appeals issued its Amended Nunc Pro Tunc Findings of Fact Conclusions of Law Opinion and Order, addressing only the corrections pointed out by the Tribes. ("June 26, 2012 Amended Findings"). The June 26, 2012 Amended Findings were not materially different from the May 8, 2012 Findings and Conclusions.

ANSWER: Answering the allegations of the first sentence of paragraph 67, Defendant admits that it filed a motion to correct clerical errors in the May 8, 2012 decision on June 7, 2012, but denies the characterization of that motion that is alleged in this sentence. Defendant admits the allegations of the second sentence of paragraph 67. Defendant admits the allegations of the third sentence of paragraph 67, except the allegation that the Tribal Court of Appeals "address[ed] only the corrections pointed out by the Tribes," which is denied. *See* Order of May 28, 2013 at 2-3. Defendant denies the allegations of the fourth sentence of paragraph 67.

68. The Tribal Court of Appeals' June 26, 2012 Amended Findings held that there was "insufficient evidence in the record" to find jurisdiction under the second *Montana* exception, which requires proof of a threat or direct impact on the health and welfare of Tribal members. (June 26, 2012 Amended Findings, pp. 15-16). As a result, the Tribal Court of Appeals remanded the case to the Tribal Court to hear evidence on the second *Montana* exception (June 26, 2012 Amended Findings, pp. 63).

ANSWER: Answering the allegations of the first sentence of paragraph 68, Defendant asserts that the Tribal Court of Appeals' June 26, 2012 decision held that the Tribal Court erred in failing to address the second *Montana* exception and that the Tribes should have had an opportunity to present evidence relevant to the second *Montana* exception, admits that the Tribal Court of Appeals found there was "insufficient evidence in the record" to find jurisdiction under the second *Montana* exception, and accordingly directed that evidence be taken on that issue. Answering the allegations of the second sentence of paragraph 68, Defendant admits that the Tribal Court of Appeals June 26, 2012 decision instructed the Tribal Court to consider whether the second *Montana* exception was satisfied in this case and remanded the case for that purpose, but asserts that the Tribal Court of Appeals subsequently determined that the second *Montana* exception issue would be heard by the Tribal Court of Appeals. Order of May 28, 2013 at 3, *Shoshone-Bannock Tribes Land Use Dep't v. FMC Corp*., Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. App. May 16, 2014); Order of February 5, 2013 at 2, 13, 18-19.

69. On June 11, 2012, the Tribal Court of Appeals entered a Judgment against FMC in the amount of $9,000,000, which consisted of the $1.5 million permit fee for six years, 2006 through 2011. Nevertheless, issues related to the Tribes' award of attorneys fees and costs and two procedural issues remained pending and were addressed at a November 8, 2012 hearing.

ANSWER: Answering the allegations of the first sentence of paragraph 69, Defendant admits that the Tribal Court of Appeals entered judgment against FMC on June 11, 2012 in the amount of nine million dollars ($9,000,000), but denies that it was for the period alleged in the first sentence. Defendant admits the allegations of the second sentence of paragraph 69.

70. On January 14, 2013, the Tribal Court of Appeals issued its Findings of Fact, Conclusions of Law, Opinion and Order re Attorney Fees and Costs. ("January 14, 2013 Findings and Conclusions"). The Tribal Court of Appeals revoked and reversed its decision to remand the case to the Tribal Court, and ordered instead that the hearing on the second *Montana* exception would be held before the Tribal Court of Appeals. (January 14, 2013 Findings and Conclusions, at 18-19). On February 5, 2013, the Tribal Court of Appeals issued Amended Findings of Fact, Conclusions of Law, Opinion and Order re Attorneys fees and Costs, Nunc Pro Tunc ("February 5, 2013 Amended Findings") making minor revisions to the January 14, 2013 Findings and Conclusions.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 70. Defendant admits the allegations of the second sentence of paragraph 70, except the allegation that the Tribal Court of Appeals "reversed" its prior decision in taking the action described in this sentence, which is denied. Defendant admits the allegations of the third sentence of paragraph 70.

71. An evidentiary hearing was unnecessary because the Tribal Court of Appeals had already found jurisdiction under the first *Montana* exception. Furthermore, despite ordering a remand, the Court had made clear in its earlier June 26, 2012 Amended Findings that it had already decided the FMC Property had caused damage to the Tribes, stating that "it was very obvious in 1998 that the Tribes' efforts were to protect their tribal members from the effects of the hazardous waste site" and that the Tribes' litigation "will benefit more than 5,500 Tribal members by protecting the health of those members . . . ." (June 26, 2012 Amended Findings, pp. 3, 17). In addition, the Tribal Court of Appeals awarded attorneys' fees and costs against FMC because "this was such a difficult case, made even more difficult by FMC's continuous

resistance to recognizing the sovereignty of the Shoshone-Bannock Tribes." (February 5, 2013 Amended Findings, p. 2). Upon information and belief, the Tribal Court of Appeals scheduled the evidentiary hearing so the Tribes could supplement the record in support of its pre-determined decision that jurisdiction existed under the second *Montana* exception.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 71 except the allegation that "the Tribal Court of Appeals had already found jurisdiction under the first *Montana* exception," which Defendant admits. Answering the allegations of the second sentence of paragraph 71, Defendant denies that "the Court had made clear in its earlier June 26, 2012 Amended Findings that it had already decided the FMC Property had caused damage to the Tribes," denies that the Tribal Court of Appeals had done so "despite ordering a remand," denies that the June 26, 2012 decision contains the quoted language in this sentence, and denies that the quoted language supports the allegations of this sentence in any event. Defendant further asserts that: (a) the statement that "it was very obvious in 1998 that the Tribes' efforts were to protect their tribal members from the effects of the hazardous waste site" is a partial quotation from page 3 of the Tribal Court of Appeals' February 5, 2013 Order, which refers to the prior proceedings in this Court that were concluded by this Court's March 6, 2006 Order and the appeals arising from the counterclaims filed by the Tribes, and not to the second *Montana* exception or any proceedings concerning that exception; and that (b) the statement that the Tribes' litigation "will benefit more than 5,500 Tribal members by protecting the health of those members . . . ." is a partial quotation from page 17 of the Tribal Court of Appeals' February 5, 2013 Order, which simply explains one reason why the Tribal Court of Appeals applied the private attorney general exception to the American rule that a prevailing litigant is ordinarily not entitled to collect attorney fees from the losing litigant, as shown by the Tribal Court of Appeals Findings of Fact

No. 8 on page 14 of the February 5, 2013 Order. Defendant admits the allegations of the third sentence of paragraph 71. Defendant denies the allegations of the fourth sentence of paragraph 71.

72. After the Business Council replaced all three judges on the panel of the Tribal Court of Appeals with three new judges, the evidentiary hearing was held starting April 1, 2014, and continuing through April 14, 2014. At the April 2014 hearing, the Tribes and FMC presented witness testimony, documentary evidence, and legal arguments regarding the second *Montana* exception. In particular, FMC presented extensive evidence that the FMC Property conditions do not create a risk outside the FMC Property boundaries, that activities conducted on the FMC Property since FMC started production of elemental phosphorus in 1949 had not had any impact on the health or welfare of the Tribes or Tribal members, and that the EPA's control and oversight regarding environmental conditions at the FMC Property ensured that no risks would develop in the future.

ANSWER: Answering the allegations of the first sentence of paragraph 72, Defendant denies the allegation that the Business Council replaced all three judges on the Tribal Court of Appeals panel, or any one or more of those judges, with new judges, and admits that the evidentiary hearing on the second *Montana* exception was held before the Tribal Court of Appeals from April 1, 2014 to April 14, 2014. Defendant admits the allegations of the second sentence of paragraph 72. Defendant denies the allegations of the third sentence of paragraph 72, and denies that "FMC presented extensive evidence" in support of the allegations of the third sentence.

73. At the conclusion of the evidentiary hearing, the Tribal Court of Appeals issued its decision on the second *Montana* exception on April 15, 2014 (the "April 15, 2014 Decision").

Consistent with its earlier June 26, 2012 Amended Findings, the Tribal Court of Appeals held that the Tribes had established jurisdiction under the second *Montana* exception.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 73. Defendant admits the allegations of the second sentence of paragraph 73, that the Tribal Court of Appeals held that the Tribes had established jurisdiction under the second *Montana* exception, April 15, 2014 Statement of Decision, *Shoshone-Bannock Tribes Land Use Dep't v. FMC Corp*., Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("April 15, 2014 Decision"), and that this holding is consistent with the Tribal Court of Appeals' June 26, 2012 Amended Findings in that both decisions uphold tribal jurisdiction under *Montana*, but otherwise denies the allegations of the second sentence.

74. The Tribal Court of Appeals failed to apply the well-established federal law requirements that: (a) in order for jurisdiction to exist under the second *Montana* exception, the non-member's conduct "must do more than injure the tribe, it must imperil the subsistence of the tribal community," *Evans v. Shoshone-Bannock Land Use Policy Com'n***,** 736 F.3d 1298, 1306 (9th Cir. 2013), and (b) the elevated threshold for application of the second *Montana* exception "requires that Tribal power must be necessary to avert catastrophic consequences." *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316, 341 (2008).

ANSWER: Defendant denies the allegations in paragraph 74 that the Tribal Court of Appeals failed to apply well-established federal law requirements. The remaining allegations of paragraph 74 otherwise purport to state legal conclusions to which no response is required, but if a response is required, Defendant denies that the selective quotations that appear in this sentence, which are extracted from the context in which they were made, accurately state the requirements

of the second *Montana* exception, and denies the characterization of the requirements of the second *Montana* exception which is alleged in this paragraph.

75. The Tribal Court of Appeals disregarded that EPA regulation of wastes at the FMC Property assures adequate protection of the health and welfare of tribal members.

ANSWER: Answering the allegations of paragraph 75, Defendant denies that the Tribal Court of Appeals disregarded FMC's argument "that EPA regulation of wastes at the FMC property assures adequate protection of the health and welfare of tribal members," and denies that EPA regulation of wastes at the FMC Property assures adequate protection of the health and welfare of tribal members.

76. Relying on its flawed reasoning, the Tribal Court of Appeals issued an Opinion, Order, Findings of Fact and Conclusions of Law dated May 16, 2014 (the "May 16, 2014 Findings and Conclusions") that adopted the Tribes' Proposed Findings of Fact and Conclusions of Law. The Tribal Court of Appeals issued a Final Judgment against FMC, also dated May 16, 2014, in the amount of $20,519,318.41 ($19,500,000 in Permit fees for the years 2002 through 2014, $928,220.50 in attorneys' fees, and $91,097.91 in costs) ("May 16, 2014 Final Judgment"). In addition, the May 16, 2014 Final Judgment orders FMC to pay the $1.5 million Permit fee each year in perpetuity.

ANSWER: Answering the allegations of the first sentence of paragraph 76, Defendant admits that the Tribal Appellate Court issued its Opinion, Order, Findings of Fact and Conclusions of Law, *Shoshone-Bannock Tribes Land Use Dep't v. FMC Corp*., Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("May 16, 2014 Final Judgment") on May 16, 2014; Defendant asserts that decision was based on the Tribal Appellate Court's April 15, 2014 Decision, on which the Defendant's Proposed Findings of Fact and

Conclusions of Law were also based, and accordingly, Defendant denies that the May 16, 2014 Final Judgment was based on flawed reasoning and that it adopted the Defendant's Proposed Findings of Fact and Conclusions of Law. Defendant admits the allegations of the second sentence of paragraph 76. Defendant denies the allegations of the third sentence of paragraph 76.

77. The decisions of the Tribal Court of Appeals are clearly erroneous and contrary to federal law regarding the limited scope of the Tribes' jurisdiction under *Montana.*

ANSWER: Defendant denies the allegations of paragraph 77.

IV. LEGAL AUTHORITY

78. The LUPC, Business Council, the Tribal Court, and Tribal Court of Appeals each ignored United States law in finding that the Tribes have jurisdiction over FMC.

ANSWER: Defendant denies the allegations of paragraph 78.

79. Both the United States Supreme Court and the Ninth Circuit Court of Appeals have established the general rule that Indian tribes do not have jurisdiction, either legislative or adjudicative, over non-member conduct or activities taking place on an Indian reservation, particularly when that conduct or activity takes place on fee land. *Montana v. United States, supra; Strate v. A-1 Contractors,* 520 U.S. 438, 452 (1977); *Plains Commerce Bank; supra; Evans v. Shoshone-Bannock Land Use Policy Commission, supra.*

ANSWER: The allegations of paragraph 79 purport to state legal conclusions to which no response is required, but if a response is required, Defendant denies the allegations of paragraph 79, which ignore significant areas in which the United States Supreme Court and the Court of Appeals for the Ninth Circuit have recognized tribal jurisdiction over non-members, ignore the *Montana v. United States*, 450 U.S. 544 (1981), exceptions, and ignore the Tribal Court of Appeals decisions that correctly applies federal law to hold that the Tribes have

jurisdiction to require FMC to obtain a waste storage permit and pay the annual permit fee under the *Montana* exceptions.

80. The Ninth Circuit has held that the general rule against tribal jurisdiction over non-Indians "is particularly strong when the non-member's activity occurs on land owned in fee simple by non-Indians—what [the Supreme Court has] called 'non-Indian fee land.' *Evans,* 736 F.3d at 1302-1303, *quoting Plains Commerce,* 554 U.S. at 328. "[T]he Tribes' efforts to regulate" owners of non-Indian fee owned land "are 'presumptively invalid.'" *Evans,* 736 F.3d at 1303, *quoting Plains Commerce,* 554 U.S. at 330.

ANSWER: The allegations of paragraph 80 purport to state legal conclusions to which no response is required, but if a response is required, Defendant denies the allegations of paragraph 80, which extract two quotations from the context in which they were made and on that basis purport to state conclusions of law; these allegations also ignore the *Montana* exceptions, and ignore the Tribal Court of Appeals decisions that correctly applies federal law to hold that under the *Montana* exceptions the Tribes have jurisdiction to require FMC to obtain a waste storage permit and pay the annual permit fee.

81. The Supreme Court has stated that "[o]ur cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce,* 554 U.S. at 328. "This necessarily entails 'the loss of regulatory jurisdiction over the use of the land by others.' *Plains Commerce,* 554 U.S. at 329, *quoting South Dakota v. Bourland,* 508 U.S. 679, 689 (1993). "As a general rule, then, 'the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.' *Plains Commerce,* 554 U.S. at 329, *quoting Brendale, v. Confederated Tribes and Bands of Yakima Indian Nation,* 492 U.S. 408, 430 (1989).

ANSWER: The allegations of paragraph 81 purport to state legal conclusions to which no response is required, but if a response is required, Defendant denies the allegations of paragraph 81, which extract quotations from the context in which they were made and on that basis purport to state conclusions of law; these allegations also ignore the *Montana* exceptions, and ignore the Tribal Court of Appeals decisions that correctly applies federal law to hold that the Tribes have jurisdiction to require FMC to obtain a waste storage permit and pay the annual permit fee under the *Montana* exceptions.

82. The Tribes no longer retain the "exclusive use and benefit" of the FMC Property. The Indian General Allotment Act allotted significant portions of the Fort Hall Reservation, including the FMC Property, to individual members of the Tribes. In the 1910's and 1920's lands comprising the FMC Property were alienated and passed through sale to non-Tribal members and eventually to FMC. The Tribes' rights must be read in light of those alienations. *Brendale,* 492 U.S. at 422.

ANSWER: Answering the allegations of the first sentence of paragraph 82, Defendant admits that Plaintiff owns the FMC Property in fee, but lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the unattributed quotation that appears in that sentence, and therefore denies it. Defendant denies the allegations of the second sentence of paragraph 82. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of the third sentence of paragraph 82, and therefore denies those allegations. Answering the allegations of the fourth sentence of paragraph 82, Defendant admits that the Tribes have rights, including rights which may be exercised on the FMC Property; the remaining allegations of the fourth sentence of paragraph 82 purports to state a legal conclusion to which no response is required, but to the extent a response is required, denied.

83. FMC, as a non-Indian owner of fee land on the Fort Hall Reservation, is not subject to tribal civil authority unless the Tribes establish one of the two limited *Montana* exceptions. The first *Montana* exception is that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana,* 450 U.S. at 565. The second *Montana* exception is that "[a] tribe may also retain inherent power to exercise civil authority of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana,* 450 U.S. at 566. Neither is present here.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 83, which purport to address all forms of civil authority, admits the allegations of the second and third sentences, and denies the allegations of the fourth sentence of paragraph 83.

84. Both *Montana* exceptions are "limited" and cannot be construed in a manner that would "swallow the rule," or "severely shrink" it. *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 655 (2001); *Strate,* 520 U.S. at 458; *Plains Commerce Bank,* 554 U.S. at 330.

ANSWER: The allegations of paragraph 84 purport to state legal conclusions to which no response is required, but to the extent a response is required, denied.

85. The burden rests on the Tribes to establish one of the exceptions to *Montana's* general rule that would allow extension of the Tribes' authority to regulate FMC's activities on the FMC Property. The Tribes have not met this burden.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 85, and asserts that in this case the Tribes have met that burden and have established jurisdiction under

both *Montana* exceptions. Defendant denies the allegations of the second sentence of paragraph 85.

A. The Tribal Court of Appeals Violated Federal Law By Holding That the Tribes Can Establish "Consensual Relationship" Jurisdiction Through Coercive Assertions of Government Authority.

1. The First Montana Exception Requires Consensual Relationships, Not Coercive Assertions of Governmental Authority.

a. FMC Reasonably Believed That, Without a Negotiated Settlement, the Tribes Would Force Plant Shutdown Under a Tribal Court Injunction.

86. The Tribes do not have civil regulatory jurisdiction over FMC under the first *Montana* exception because, in acceding to the Tribes' coercive threats to shut the Pocatello Plant, FMC did not enter into a "consensual relationship" with the Tribes "through commercial dealing, contracts, leases, or other relationships." *Montana,* 450 U.S. at 566.

ANSWER: Answering the allegations of paragraph 86, Defendant denies that "[t]he Tribes do not have civil regulatory jurisdiction over FMC under the first *Montana* exception," denies that the Tribes made coercive threats to shut the Pocatello Plant, denies that FMC acceded to such alleged threats, and denies that FMC did not enter into a "consensual relationship" with the Tribes "through commercial dealing, contracts, leases, or other relationships." *Montana*, 450 U.S. at 566.

87. Because non-members have no say in the laws and regulations governing tribal territory and have no constitutional protections against Tribes, tribal laws may be applied only to non-members who have consented to tribal authority, expressly or by action.

ANSWER: Answering the allegations of paragraph 87, Defendant denies that non-members have no say in the laws and regulations governing tribal territory and have no constitutional protections against Tribes, which are provided under the Tribal Constitution and

on the terms set forth in the Indian Civil Rights Act, and denies that "tribal laws may be applied only to non-members who have consented to tribal authority, expressly or by action."

88. The Tribal Court of Appeals ruled that tribal jurisdiction can be established under the first *Montana* exception based on the Tribes coercing FMC to acquiesce to Tribal governmental demands of purported authority. No federal court has found that a concession to tribal governmental demands can constitute a "consensual relationship" under *Montana.* If permitted to stand, that ruling would give Indian tribes the ability to coerce "consensual relationships" and thereby create tribal jurisdiction even where the non-member has not had any desire to interact or do business with the tribe. Without a desire to interact, settlement is not consensual.

ANSWER: Answering the allegations of the first sentence of paragraph 88, Defendant admits that the Tribal Court of Appeals ruled that Tribal jurisdiction exists in this case under the first *Montana* exception, but denies that ruling was based on the Tribes coercing FMC to acquiesce to Tribal governmental demands of purported authority. The second and third sentences of paragraph 88 allege conclusions of law to which no response is required, but to the extent a response is required, denied. Answering further the allegations of the third sentence of paragraph 88, Defendant denies that the Tribes did coerce FMC to acquiesce to Tribal governmental demands of purported authority, and denies the allegations of the remainder of paragraph 88.

89. After the 1995 Tribal Court action that resulted in an *ex parte* injunction against FMC, FMC understood that uninterrupted operation of the Pocatello Plant was in serious jeopardy if the parties were to litigate their jurisdictional dispute. Under federal law, in the event of a "colorable" assertion of jurisdiction, exhaustion of tribal remedies is required before

seeking federal court review of jurisdictional determinations. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 850-53 (1985). Thus, FMC reasonably believed that it would be required to litigate first in the Tribal Court, and then in the Tribal Court of Appeals, a process which could take years and which would likely result in plant shutdown pursuant to Tribal Court order, enforceable under Tribal police powers, while litigation proceeded. This threat was substantial because Tribal authorities have historically blocked rail lines, public intersections, and interstate highways to obstruct the flow of commerce.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the first sentence of paragraph 89, and therefore denies those allegations. The second sentence of paragraph 89 alleges a conclusion of law to which no response is required, but the extent a response is required, denied. Answering the allegations of the third sentence of paragraph 89, Defendant denies that litigating in Tribal Court "would likely result in plant shutdown pursuant to Tribal Court order, enforceable under Tribal police powers, while litigation proceeded," and otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in this sentence, and therefore denies those allegations. Answering the allegations of the fourth sentence of paragraph 89, Defendant denies that the alleged threat referred to in this sentence was "substantial," and denies that "Tribal authorities have historically blocked rail lines, public intersections, and interstate highways to obstruct the flow of commerce."

90. In this case, the Tribes' threatened exercise of jurisdiction left FMC with the "choice" of either permanently shutting down the Pocatello Plant and violating long-term supply contracts, or acceding to the Tribes' governmental power and paying the Tribes' fee. Such a "choice" is no choice at all.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 90. Answering the allegations of the second sentence of paragraph 90, Defendant denies that Plaintiff was presented with the choice alleged in the first sentence, and therefore denies the allegations of the second sentence.

91. Permitting the Tribes to establish "consent" under the first *Montana* exception by the coercive exercise of purported governmental authority would violate the U.S. Supreme Court's holding that decisions finding tribal jurisdiction cannot "swallow" or "severally shrink" the general rule under *Montana. Atkinson,* 532 U.S. at 647; *Strate,* 520 U.S. at 458; *Plains Commerce Bank,* 554 U.S. at 330.

ANSWER: Answering the allegations of paragraph 91, Defendant denies that the Tribes established a consensual relationship under the first *Montana* exception "by the coercive exercise of purported governmental authority," denies that the Tribal Court of Appeals ruling that the Tribes have jurisdiction under the first *Montana* exception is contrary to any holding of the United States Supreme Court, denies the allegations of paragraph 91 as a whole, and denies that the cases cited in paragraph 91 support the allegations of this paragraph.

b. The Tribes' Claims of Tribal Jurisdiction Are Founded Entirely On Their Coercive Assertions of Governmental Authority.

92. Throughout the Tribal exhaustion proceedings that commenced in 2006, the Tribes have relied on the same three bases for their assertion of jurisdiction over FMC under the first *Montana* exception: (a) the August 11, 1997 letter from FMC to the Tribes; (b) the 1998 Compliance Correspondence; and (c) the RCRA Consent Decree itself.

ANSWER: Defendant denies the allegation that the documents referred to in paragraph 92 provide the exclusive basis on which the Tribes have relied to establish jurisdiction under the

first *Montana* exception, but admits that the Tribes relied on those documents, and other evidence, to establish jurisdiction under the first *Montana* exception.

93. The Tribal Court of Appeals relied on these three legal bases for its finding that the "federally imposed limitations of tribal jurisdiction" of the United States Supreme Court "do not preclude the Shoshone-Bannock Tribes' exercise of jurisdiction in this matter." (June 26, 2012 Amended Findings, pp. 12-13). Based on these three bases, the Tribal Court of Appeals stated that it had "rejected out of hand" FMC's arguments regarding jurisdiction. (February 5, 2013 Amended Findings, p. 2). The Tribal Court of Appeals also ruled that the issue of jurisdiction "should have been obvious under the circumstances." (February 5, 2013 Amended Findings, p. 14).

ANSWER: Defendant admits the allegation that the Tribal Court of Appeals relied on the documents cited in paragraph 93 to support its June 26, 2012 ruling but denies that those documents provided the exclusive basis for that ruling, and denies that the first sentence accurately characterizes that ruling. Defendant denies the characterization of the Tribal Court of Appeals February 5, 2013 Order that is alleged in the second sentence of paragraph 93. The quote from February 5 Order of the Tribal Court of Appeals that appears in that sentence addressed FMC's jurisdictional objection to the Court's award of attorneys fees and costs, which had already been rejected by the Tribal Court of Appeals' in its merits ruling on the first *Montana* exception. Defendant admits that the February 5 Order contains the statement quoted in the third sentence of paragraph 93, but denies the characterization of that ruling that appears in this sentence. The quotation that appears in that sentence was made in support of the Tribal Court of Appeals' ruling on attorneys fees and costs, as the Court had already made its merits ruling under the first *Montana* exception.

94. There is no dispute that each of these three bases for tribal jurisdiction originate from the Tribes' assertions of purported governmental authority. Each of these three arguments begins with the non-consensual approach of the Tribes' demands that FMC must comply with their ordinances under the force of law, enforceable by governmental action and coercion.

ANSWER: Answering the allegations of the first sentence of paragraph 94, Defendant denies that "each of these three bases for tribal jurisdiction originate from the Tribes' assertions of purported governmental authority," and denies that there is no dispute over the allegation just quoted. Answering the allegations of the second sentence of paragraph 94, Defendant denies that all or any of the three arguments referred to by Plaintiff in this paragraph "begins with the non-consensual approach of the Tribes' demands that FMC must comply with their ordinances under the force of law, enforceable by governmental action and coercion," and denies the allegation that the Tribes have such an "approach."

95. The Tribal Court of Appeals made it clear that the Tribes' assertion of jurisdiction originates in the Tribes' governmental authority, as opposed to an "express congressional delegation." *Montana,* 450 U.S. at 565. The Tribal Court of Appeals wrote: "The Tribes assert that the LUPC, Business Council, and this Court have jurisdiction pursuant to the Shoshone-Bannock Tribal Constitution & Bylaws, the Fort Bridger Treaty of 1868, the following portions of the Shoshone-Bannock Tribal Law and Order Code: Chapter I, sections 1, 2, and 2.1; and Chapter III, sections 1 and 1.2, and other well-settled principles of general federal Indian law." (June 26, 2012 Amended Findings, pp. 12-13). Thus, if the Tribes' inherent sovereignty does not include authority to regulate FMC, then there is no legal basis for finding jurisdiction.

ANSWER: Answering the allegations of the first sentence of paragraph 95, Defendant denies that the Tribes' assertion of jurisdiction originates only in its governmental authority, and

denies that the Tribal Court of Appeals made that incorrect assertion clear. Defendant admits that the quotation that appears in the second sentence of paragraph 95 appears in the cited decision, but denies that it accurately characterizes that decision. Defendant denies the allegations of the third sentence of paragraph 95.

96. The jurisdiction claimed by the Tribes under these provisions is nearly unlimited in its expanse. Chapter I, Section 1 of the Law and Order Code provides that the Tribes have jurisdiction over "[A]ll civil actions arising under this Code or at common law in which the defendant is found within the Fort Hall Reservation . . . ." (Law and Order Code, Chapter I, Section 1(2)). Chapter I, Section 2.1 provides that, "The Shoshone- Bannock Tribal Court shall have jurisdiction over all civil matters and actions as described in this Law and Order Code, as well as civil jurisdiction over all ordinances that may hereafter be passed by the Fort Hall Business Council . . . ." (Law and Order Code, Chapter I, Section 2.1). Chapter I, Section 2.1 provides that the Tribes have jurisdiction over any "cause of action in the Shoshone-Bannock Tribal Court wherein the cause of action arose within the exterior boundaries of the Fort Hall Reservation . . . ." (Law and Order Code, Chapter I, Section 2.1). The Law and Order Code also provides that "[t]he Shoshone-Bannock Tribal Court shall have jurisdiction of all civil suits wherein the plaintiff is the Shoshone-Bannock Tribes or is a member or that Tribe, or a member of a federally recognized Tribe." (Law and Order Code, Chapter III, Section 1.2).

ANSWER: Defendant denies the allegations of the first sentence of paragraph 96. Defendant admits that the selective quotations contained in the remaining allegations of paragraph 96 appear in the cited sources, but denies that the stringing together of these selective quotations describe the jurisdiction claimed by the Tribes under federal law.

97. The jurisdiction claimed by the Tribes in this case originates in this, their own overly expansive view of their authority, which expressly exceeds federal law.

ANSWER: Defendant denies the allegations of paragraph 97.

2. Even if Jurisdiction Could Be Founded on Government Coercion, Judge Maguire of the Tribal Court Correctly Ruled That the Letters Between FMC and the Tribes Were Not a Contract.

98. Both the August 11, 1997 letter and the 1998 Compliance Correspondence resulted from the Tribes' governmental assertion that the Tribes had jurisdiction over the FMC Property. These assertions were based on the Tribes' 1977 Land Use Policy Ordinance, and the 1979 Guidelines, which have since been superseded by the 2010 Land Use Policy Ordinance.

ANSWER: The Tribes' assertion of jurisdiction in this case arose from the activities engaged in by FMC on the Reservation, which made certain Tribal laws applicable to those activities, and from consensual relationships entered into with the Tribes by FMC, which are evidenced by the documents cited in the first sentence of paragraph 98 (as well as other documents and evidence), but Defendant otherwise denies the allegations of the first sentence of paragraph 98. Defendant admits that the sources of law on which it relies to assert jurisdiction over FMC include the Tribal laws that are referenced in the second sentence of paragraph 98, but denies that these laws are the only such sources, and denies that the 2010 LUPO superceded the 1979 Guidelines.

99. First, the letter of August 11, 1997, arose because the Tribes demanded that FMC apply for a building permit for Ponds 17 and 18 pursuant to the Ordinance and the 1979 Guidelines. The Tribes had been making this demand for a number of years, and FMC had resisted this unfounded assertion of governmental authority. However, the circumstances in August 1997 finally required that FMC either obtain a building permit from the Tribes or shut down the Pocatello Plant. "Consent" under the first *Montana* exception cannot be established

where the action that is alleged to be "consent" is in response to a tribe's assertion of governmental authority.

ANSWER: Defendant admits that the LUPO and the LUPO Guidelines required FMC to apply for a building permit for Ponds 17 and 18 in 1997 (or earlier), but lacks knowledge or information sufficient to form a belief about the truth of the allegation that FMC's August 11 letter arose from those requirements and therefore denies that allegation. Answering the allegations of the second sentence of paragraph 99, Defendant denies the vague and general allegations that the "Tribes had been making this demand for a number of years," and that FMC had resisted applying for a Tribal Building Permit for a number of years, and denies the allegation that the Tribes' assertion of jurisdiction in this case is unfounded.

100. FMC responded to this assertion of governmental authority and submitted the building permit application, along with a letter stating that it did not consent to the jurisdiction of the Tribes and did not intend to create a consensual relationship. (August 1, 1997 Letter from FMC to LUPC Chair; August 1, 1997 Letter from FMC to Tribal Attorney). However, the Tribes refused to process the required building permit application without an expression of consent to jurisdiction by FMC, which required FMC to state that it consented to jurisdiction but with the limitation that it was only "with regard to the zoning and permitting requirements *as specified in the current* Fort Hall Land Use Operative Policy Guidelines." (August 11, 1997 Letter) (emphasis added).

ANSWER: Answering the allegations of the first sentence of paragraph 100, Defendant admits that FMC responded to the Tribes' assertion that under Tribal law a Building Permit was required to construct Ponds 17 and 18 by submitting a building permit application and the August 1 Bush Letter, the terms of which are discussed in the answer to paragraph 29 of this

complaint, which discussion Defendant incorporates herein, and otherwise denies the allegations of this sentence. Answering the allegations of the second sentence of paragraph 100, Defendant admits that the LUPC informed FMC on August 6, 1997 that FMC's application for a building permit for Ponds 17, 18 and 19 could not be accepted with the August 1 Bush Letter attached to it because, as the letter explained, LUPC understood that based on the "'FMC Initiative'" and a "July 10, 1997 [meeting] with FMC, EPA, and Tribal officials," "FMC would recognize tribal jurisdiction within the exterior boundaries of the Fort Hall Reservation," Letter from Tony Galloway, Chairman, LUPC to Dave Buttelman, Health, Safety and Environmental Manager, FMC (Aug. 6, 1997); Defendant admits that Plaintiff delivered a letter to the LUPC on August 11, 1997 that consented to Tribal jurisdiction in the following terms "[t]hrough the submittal of the Tribal 'Building Permit Application' and the Tribal 'Use Permit Application' for Ponds 17, 18, and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use operative Policy Guidelines," Letter from J. David Buttelman, Health, Safety, and Environmental Manager, FMC to Tony Galloway, Land Use Chairman, Shoshone-Bannock Tribes (Aug, 11, 1997), but denies that FMC was required to so state and denies the characterization of that letter that appears in the second sentence of paragraph 100; Defendant otherwise denies the allegations of the second sentence.

101. The August 11, 1997 letter from FMC to the Tribes did not result from any desire of FMC to do business with the Tribes, or because the Tribes had some commercial consideration to offer FMC in exchange for compliance. The only reason FMC had to comply was that the Tribes claimed governmental authority to require the permits and left FMC without

any means to challenge that authority without putting uninterrupted operation of the Pocatello Plant and fulfillment of long-term supply contracts in jeopardy.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the first sentence of paragraph 101, and therefore denies those allegations; Defendant also denies the allegation made in this sentence that the Tribes had no consideration to offer FMC in exchange for compliance that had commercial value to FMC. Answering the allegations of the second sentence of paragraph 101, Defendant denies that "[t]he only reason FMC had to comply" was as alleged in the sentence, and denies that FMC was left with no means to challenge the Tribes' jurisdiction "without putting uninterrupted operation of the Pocatello Plant and fulfillment of long term supply contracts in jeopardy."

102. Second, the 1998 Compliance Correspondence arose only because the Tribes again demanded that FMC pay non-consensual permit fees established pursuant to the Ordinance and the 1979 Guidelines, and the new proposed April 1998 temporary Amendments, which provided for annual hazardous waste siting fees, and established a permit fee schedule and a fee for storage of hazardous and non-hazardous waste on the Reservation.

ANSWER: Defendant denies the allegations of paragraph 102 that the 1998 Compliance Correspondence arose only for the alleged reasons stated in this paragraph, and denies the vague allegation that "the Tribes again demanded that FMC pay non-consensual permit fees established pursuant to the Ordinance and the 1979 Guidelines, and the new proposed April 1998 temporary Amendments, which provided for annual hazardous waste siting fees, and established a permit fee schedule and a fee for storage of hazardous and non-hazardous waste on the Reservation," but admits that FMC subsequently agreed to obtain a waste storage permit from the Tribes and to

pay the annual permit fee, and in so doing and by other actions agreed to recognize Tribal jurisdiction for those purposes.

103. The 1998 Compliance Correspondence did not arise because FMC desired to do business with the Tribes, or because the Tribes had some commercial consideration to offer FMC in exchange for the agreement. This Compliance Correspondence arose only because the Tribes asserted that they had the governmental authority to require the payment of these fees and threatened legal action which put FMC's continued operation at the Pocatello Plant and fulfillment of contractual obligations in jeopardy.

ANSWER: Answering the allegations of the first sentence of paragraph 103, Defendant denies that there were no business or commercial benefits to FMC of an agreement with the Defendant; Defendant otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the first sentence of paragraph 103 and therefore denies those allegations. Answering the allegations of the second sentence of paragraph 103, Defendant denies that the Compliance Correspondence arose only for the reasons alleged in this sentence, admits that the Tribes asserted that they had the governmental authority to require FMC to obtain a waste storage permit and pay the annual permit fee, denies that the Tribes "threatened legal action which put FMC's continued operation at the Pocatello Plant and fulfillment of contractual obligations in jeopardy," and otherwise denies all of the allegations made in the second sentence of paragraph 103.

104. The 1998 Compliance Correspondence letters do not prove any consensual relationship between FMC and the Tribes. They prove only that when confronted with the Tribes' demands that FMC comply with Tribal laws, FMC negotiated a resolution that provided for payment of money to the Tribes and incorporated certain terms and conditions, which the

Tribes failed to adhere to. Neither the August 11, 1997 letter nor the 1998 Compliance Correspondence took on the "attributes of a contract," as Judge Maguire correctly found. Submission of a permit application is not a basis of a "consensual relationship." Even if it were, the August 11, 1997 letter merely constituted an offer to abide by the then-current Ordinance and Guidelines, with a permit fee of $10.00. The Tribes rejected that offer by proposing just weeks later a new, drastically different fee schedule.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 104. Answering the allegations of the second sentence of paragraph 104, Defendant admits that in response to the Tribes' assertion that Tribal law required FMC to obtain a waste storage permit from the Tribes and to pay the annual permit fee, FMC agreed to do so and that in so doing and by its other actions FMC agreed to recognize Tribal jurisdiction for those purposes, but denies the characterization of FMC's agreement that is made in this sentence, denies the allegation that the Tribes failed to adhere to "certain terms and conditions" that FMC alleges were included in its agreement but fails to identify in this sentence, and denies the allegation that the Tribes did not adhere to the terms and conditions of the agreement. Answering the allegations of the third sentence of paragraph 104, Defendant denies that "[n]either the August 11, 1997 letter nor the 1998 Compliance Correspondence took on the 'attributes of a contract,'" as both in fact did so, and denies that Judge Maguire correctly found that "[n]either the August 11, 1997 letter nor the 1998 Compliance Correspondence took on the 'attributes of a contract . . . .'" Defendant denies the allegations of the fourth sentence of paragraph 104. Answering the allegations of the fifth sentence of paragraph 104, Defendant denies the allegation that "the August 11, 1997 letter merely constituted an offer to abide by the terms of the then-current Ordinance and Guidelines, with a permit fee of $10.00." Answering the allegations of the fifth sentence, Defendant denies

that "[t]he Tribes rejected" the offer alleged in the preceding sentence, as no such offer was made, denies the allegation that "just weeks later" the Tribes proposed "a new, drastically different fee schedule," and otherwise denies all allegations made in the fifth sentence.

105. The 1998 Compliance Correspondence was, as Judge Maguire found, merely an agreement about how a governmental entity would apply a particular draft ordinance to a regulated entity. Notably, the Tribes simultaneously sought enforcement of the fee under two separate and mutually exclusive theories in the Tribal Court: breach of contract, and as payment of a legally-required permit fee. Judge Maguire correctly rejected the Tribes' argument that they could convert the permit fee understanding into a contract-based claim.

ANSWER: Answering the allegations of the first sentence of paragraph 105, Defendant denies that "[t]he 1998 Compliance Correspondence was merely an agreement about how a governmental entity would apply a particular draft ordinance to a regulated entity," and denies that Judge Maguire so found. Answering the allegations of the second sentence of paragraph 105, Defendant admits that in the Tribal Court the Tribes sought to enforce FMC's obligation to obtain a waste storage permit and pay the annual permit fee on a contract theory and as a regulatory requirement, but denies that these theories are "mutually exclusive." Answering the allegations of the third sentence of paragraph 105, Defendant denies that the Tribes argued "that they could convert the permit fee understanding into a contract-based claim," denies that any such argument was correctly rejected by Judge Maguire, and denies that the argument that the Tribes did make was correctly rejected by Judge Maguire.

3. Even if Jurisdiction Could Be Founded on Coercion, and Even if the Letters Constituted a Consensual Relationship, That Relationship Was Limited in Duration and Scope.

106. To the extent that the 1998 Compliance Correspondence established any "relationship" between FMC and the Tribes, whether consensual or non-consensual, that

relationship no longer exists as a result of FMC's May 23, 2002 repudiation of that relationship shortly after the Pocatello Plant shutdown in December 2001.

ANSWER: Answering the allegations of paragraph 106, Defendant admits that the 1998 Compliance Correspondence established a consensual relationship between FMC and the Tribes, and denies that the relationship was non-consensual; Defendant denies that the relationship no longer exists, and denies that FMC repudiated that relationship on May 23, 2002 shortly after the Pocatello Plant shutdown in December 2001.

107. "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another--it is not "in for a penny, in for a Pound." *Atkinson,* 532 U.S. at 656. FMC's acquiescence to pay a permit fee for waste generation and disposal does not allow the Tribes to charge a permit fee, in perpetuity, for what the Tribes characterize as waste "storage" on the FMC Property.

ANSWER: Defendant admits that the quotation in the first sentence of paragraph 107 is found in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (quoting Edward Ravenscroft, *The Canterbury Guests; Or A Bargain Broken*, act 5, sc. 1), but denies that it has any application to this case. Answering the allegations of the second sentence of paragraph 107, Defendant admits that FMC agreed to obtain a waste storage permit from the Tribes and pay an annual permit fee for as long as FMC was storing waste on the Reservation, and admits that FMC is storing waste on the Reservation, but otherwise denies the allegations of this sentence.

108. Although the April 1998 and May 1998 Chapter V Guidelines were never adopted and BIA-approved, even if they were enforceable against FMC, at the time of the 1998 Compliance Correspondence, the Chapter V Guidelines addressed only waste generation, not storage.

ANSWER: Defendant denies the allegation of paragraph 108 that BIA approval was required for the LUPC to promulgate the May 1998 Chapter V Guidelines, and denies that such approval would have been required if the LUPC had promulgated the April 1998 Guidelines, because the Ordinance delegates to the LUPC authority to amend the 1979 Guidelines without further approval of the Business Council or the Secretary, and the Ordinance was approved by the BIA. Defendant admits the allegation in paragraph 108 that the May 1998 Guidelines were enforceable against FMC, but denies the allegation in paragraph 108 that the May 1998 Guideline amendments addressed only waste generation and disposal, not storage.

109. FMC negotiated the 1998 fee in response to the Tribes' efforts to regulate FMC's expansion of its waste disposal capacity through construction of Ponds 17 and 18. The factual context of the 1998 Compliance Correspondence is clearly based upon the understanding that the Pocatello Plant would continue operating and generate and dispose of waste. It was not contemplated that FMC would close the Pocatello Plant and cease operations, as well as waste generation, in December 2001.

ANSWER: Defendant asserts that FMC negotiated with the Tribes in 1998 in order to obtain a waste storage permit and reach agreement on the annual permit fee, and otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the first sentence of paragraph 109, and therefore denies that allegation. Defendant denies the allegations of the second sentence of paragraph 109. Defendant denies the allegation in the third sentence of paragraph 109 that FMC ceased to generate waste in December of 2001, denies that FMC closed the Pocatello Plant and ceased operations in December 2001, and lacks knowledge or information sufficient to form a belief about the truth of the allegations of the third sentence concerning what FMC contemplated in 2001, and therefore denies those allegations.

110. The 1998 Compliance Correspondence required the Tribes to formally adopt a waste-related ordinance to codify and make permanent the parties' understanding, but the Tribes failed to do so. Rather than propose an ordinance that set forth the parties' understanding based upon waste generation and disposal, the Tribes proposed ordinances such as the Hazardous Waste Management Act, which was never adopted, and the Waste Management Act, which was adopted in 2005 and amended in 2009, that created a partial regulatory framework for the treatment, disposal, and *storage* of waste.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 110 that the 1998 Compliance Correspondence required the Tribes to formally adopt a waste-related ordinance to codify and make permanent the parties' understanding, and as no such requirement existed, denies that the Tribes failed to do so. Defendant denies the reiteration of the allegations of the first sentence in the second sentence of paragraph 110. Answering the remainder of the second sentence of paragraph 110, Defendant admits that it proposed the Hazardous Waste Management Act ("HWMA") and the Waste Management Act ("WMA"), but denies that the HWMA was never adopted; Defendant admits that the WMA was adopted in 2005 and amended in 2009, and that it created a partial regulatory framework for the treatment, disposal and storage of waste, but denies any inference that the storage of waste is not addressed by the Ordinance, the 1979 Guidelines, and the HWMA.

111. Even if the 1998 Compliance Correspondence constituted any consent to tribal jurisdiction, FMC's consent was limited in scope to fees for waste generation.

ANSWER: Defendant admits that the 1998 Compliance Correspondence constituted FMC's consent to Tribal jurisdiction, and denies that it is the only source of FMC's consent to

Tribal jurisdiction. Defendant denies the remaining allegations of paragraph 111, and denies any inference that FMC does not continue to generate waste.

112. On May 23, 2002, FMC notified the Tribes in writing that it was terminating payment of the fee under the 1998 Compliance Correspondence because the Pocatello Plant had shut down and the permit fee was not owed after plant shutdown. The Tribes' response, a December 2002 Notice of Violation under the Ordinance for failure to pay the fees, demonstrates that the Tribes did not view FMC as having a consensual relationship with the Tribes, but rather a relationship of a government imposing its authority.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 112. Answering the allegations of the second sentence of paragraph 112, Defendant admits that it sent a Notice of Violation to Plaintiff in December 2002 for failure to obtain a waste storage permit and pay the annual permit fee due under the Fort Hall Land Use Operative Guidelines, Chapter V, Siting and Disposal Site/Storage Fee but denies the remainder of the sentence.

4. Any Consensual Relationship Has Long Since Expired.

113. The first *Montana* exception no longer applies after a material change in the circumstances under which "consent" was established. Even assuming, *arguendo,* that FMC's response to the Tribal assertion of governmental authority in 1998 constituted a consensual relationship, the circumstances under which that settlement were made have changed materially since that time, such that any "consent" no longer exists under the first *Montana* exception. As stated in *Atkinson Trading Co.,* 532 U.S. at 656, ". . . it's not 'in for a penny, in for a Pound.'"

ANSWER: The first sentence of paragraph 113 alleges a legal conclusion to which no response is required, but to the extent a response is required, denied. Answering the allegations of the second sentence of paragraph 113, Defendant admits that FMC's response to the Tribal assertion of governmental authority in 1998 constituted a consensual relationship, but denies that

"the circumstances under which that settlement were made have changed materially since that time," and denies that "any 'consent' no longer exists under the first *Montana* exception. Defendant admits that the quotation in the third sentence is found in *Atkinson Trading Co.*, 532 U.S. at 656, but denies that it has any application to this case.

114. Even if FMC's compliance with the Tribal governmental authority in 1998 could establish tribal jurisdiction, that consent did not encompass long-term waste storage, and has long since expired after the shutdown of commercial operations.

ANSWER: Answering the allegations of paragraph 114, Defendant admits that FMC's compliance with the Tribal governmental authority in 1998 established Tribal jurisdiction, but denies the allegation that FMC's consent did not encompass long-term waste storage, denies that FMC's consent has expired, and denies that FMC has shut down its commercial operations.

5. Even if Jurisdiction Can Be Founded on Coercion, and Even if the 1998 Compliance Correspondence Constituted a Contract, the Alleged Contract Was Terminable at Will Upon Reasonable Notice.

115. The Tribal Court of Appeals ruled that Idaho common law applied in this case, under diversity principles. February 5, 2013 Amended Findings, p. 8.

ANSWER: Defendant denies the allegations of paragraph 115 which misstate and misinterpret the Tribal Court of Appeals' February 5, 2013 Amended Findings with respect to the application of the statutory exception to the American Rule with respect to attorneys fees, in consideration of which the Court discussed federal, tribal and state law before expressly declining to decide whether the statutory exception applied at that time. *Id*. at 8. Furthermore, the Tribal Court of Appeals was not there considering the law to be applied to determine Tribal jurisdiction under the first or second *Montana* exceptions, and Defendant denies the allegations of paragraph 115 to the extent that they purport to allege that the Tribal Court of Appeals held that Idaho common law applied to determine the existence of jurisdiction under either of the

Montana exceptions, or whether the Tribal Court had personal jurisdiction over FMC and afforded FMC due process of law.

116. Idaho law clearly provides that a contract with no duration term is terminable at will upon reasonable notice. *Shulz v. Atkins,* 97 Idaho 770, 775, 554 P.2d 948, 953 (1976). Contract law does not allow perpetual contracts that have no ending, unless such an intent is clearly and expressly made. *Barton v. State,* 104 Idaho 338, 340, 659 P.2d 92, 94 (1983). The purpose of these rules is to eliminate speculation about the meaning of a contract in which the parties did not include a duration term.

ANSWER: Paragraph 116 alleges conclusions of law to which no response is required, but to the extent a response is required, Defendant denies that Idaho law, as alleged in paragraph 116 or elsewhere, applies to determine the existence of a consensual relationship under the first *Montana* exception.

117. If the 1998 Compliance Correspondence is viewed as a commercial contract, it should be interpreted according to the Idaho law of contract interpretation.

ANSWER: Defendant denies the allegations of paragraph 117.

118. By means of a letter dated May 23, 2002, FMC expressly terminated the 1998 Compliance Correspondence agreement when it gave notice to the Tribes that it would no longer pay the $1.5 million fee due to Plant shutdown.

ANSWER: Defendant denies the allegations of paragraph 118 that FMC terminated the 1998 Compliance Correspondence agreement by the letter of May 23, 2002, denies that the May 23, 2002 letter gave notice to the Tribes that FMC would no longer pay the $1.5 million fee due to plant shutdown, and denies that plant shutdown had occurred as of May 23, 2002 or to date.

6. The Ninth Circuit Ruling Forecloses the Conclusion That the RCRA Consent Decree Provides Evidence of a Consensual Relationship With the Tribes.

119. Apart from the August 11, 1997 letter and the 1998 Compliance Correspondence, the Tribal Court of Appeals' only other basis for a finding of tribal jurisdiction under the first *Montana* exception is the conclusion that by entering into the Consent Decree with the EPA, FMC formed a "consensual relationship" with the Tribes.

ANSWER: Answering the allegations of paragraph 119, Defendant admits that the Tribal Court of Appeals relied on the August 11, 1997 letter, the 1998 Compliance Correspondence, and the RCRA Consent Decree in finding Tribal jurisdiction under the first *Montana* exception, but denies that these were the only sources on which the Tribal Court of Appeals relied in so holding; Defendant admits that by entering into the Consent Decree with the EPA, FMC formed a "consensual relationship" with the Tribes, and admits that the Tribal Appellate Court found that the RCRA Consent Decree is "another form of consensual relationship involving the same subject matter between these same parties and further supports a finding of jurisdiction" under the first *Montana* exception. June 26, 2012 Amended Findings at 15.

120. The Tribal Court of Appeals ruled that FMC consented to Tribal jurisdiction by entering into the RCRA Consent Decree. This is contradicted by the Ninth Circuit opinion on this precise issue. The Ninth Circuit vacated the District Court's March 6, 2006 Decision in its entirety based on its holding that the Tribes were not a "Party" to the RCRA Consent Decree, and in addition were not a third-party beneficiary of the RCRA Consent Decree, and therefore had no right to enforce the RCRA Consent Decree. The RCRA Consent Decree remains a matter between the United States and FMC as parties to that agreement, not third parties such as the Tribes. As a result, the Consent Decree cannot form the basis for a "consensual relationship"

between FMC and the Tribes. FMC's agreement with the United States is in no way a consensual relationship with the Tribes.

ANSWER: Answering the allegations of the first sentence of paragraph 120, Defendant admits that the Tribal Court of Appeals relied on the RCRA Consent Decree in holding that FMC consented to Tribal jurisdiction, but denies that the RCRA Consent Decree was the only basis or support for that holding. Defendant denies the allegations of the second sentence of paragraph 120. Answering the allegations of the third sentence of paragraph 120, Defendant denies the allegation that "[t]he Ninth Circuit vacated the District Court's March 6, 2006 in its entirety," admits the allegation that the Ninth Circuit held "that the Tribes were not a 'Party' to the RCRA Consent Decree, and in addition were not a third-party beneficiary of the RCRA Consent Decree" and denies the allegation that "therefore the Tribes had no right to enforce the RCRA Consent Decree." The Ninth Circuit held that the Tribes lacked standing to enforce the RCRA Consent Decree themselves, *United States v. FMC Corp*., 531 F.3d 813, 815 (9th Cir. 2008), but determined at the same time that "FMC agreed to pay the Tribes $1.5 million per year in lieu of applying for certain tribal permits," *id.* at 815; *see id*. at 817 ("FMC settled the tribal permit dispute by agreeing to pay the Tribes a fee of $1.5 million per year, beginning in 1998."), that the Tribes also have other rights under the Consent Decree, *id.* at 820-21, and that other remedies may exist by which the Tribes may enforce the Consent Decree, *id.* at 824 n.6. The Ninth Circuit also expressly preserved "the main relief that the Tribes sought in this action" by requiring FMC to continue the Tribal proceedings concerning FMC's permit applications to their conclusion. *Id.* at 823-24. Defendant therefore denies the allegations of the remainder of paragraph 120.

121. Section 8 of the RCRA Consent Decree provides: "8. Permits: Where any portion of the Work requires a federal, state, or tribal permit or approval, Defendant shall submit timely and

complete applications and take all other actions necessary to obtain all such permits or approvals." Aside from the absence of the Tribes as a Party to the Consent Decree, this provision is in no way a consent to tribal jurisdiction. At most, it provides that if there is tribal jurisdiction and if the United States believes that tribal permits are required, the United States can require FMC to obtain tribal permits.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 121. Answering the allegations of the second sentence of paragraph 121, Defendant denies that the absence of the Tribes as a Party to the Consent Decree affects the consent to Tribal jurisdiction recognized and reaffirmed by FMC in Section 8 of the RCRA Consent Decree, and denies the remainder of the second sentence. Defendant denies the allegations of the third sentence of paragraph 121, which inaccurately characterize Section 8 of the RCRA Consent Decree, but admit that the United States can require FMC to obtain Tribal permits under the Consent Decree.

122. Future enforcement of such a requirement by the United States would consist of an assertion of governmental authority, not consent on the part of FMC. Permits are required only if there is governmental authority involved. There is nothing consensual about a government demanding compliance with its laws and ordinances.

ANSWER: Answering the allegations of the first sentence of paragraph 122, Defendant admits that enforcement of section 8 of the RCRA Consent Decree by the United States would be an exercise of governmental authority, but denies that such an action would not also enforce the consent recognized and reaffirmed by FMC in Section 8 of the RCRA Consent Decree. Defendant denies all of the remaining allegations of paragraph 122.

123. Non-consensual compliance with the Tribes' governmental authority, done in response to the Tribes' threat of legal action, is not the kind of voluntary, commercial

"consensual" relationship that can form a basis for a finding of consent to tribal jurisdiction. Tribal jurisdiction under the first *Montana* exception requires a finding of a "consensual relationship" that is based upon "commercial dealing, contracts, leases, or other arrangements." *Montana,* 450 U.S. at 565. None of the three "agreements" that the Tribes claim establish "consent" are the type of commercial, consensual relationship upon which the U.S. Supreme Court and other federal courts have previously found tribal jurisdiction. *See e.g., Williams v. Lee,* 358 U.S. 217, 233 (1959) (commercial relationship between non-Indian and Indian).

ANSWER: Defendant denies the allegations of the first sentence of paragraph 123, which misstate the facts of this case, denies the legal conclusion that Plaintiff alleges based on inaccurate allegations, and denies that the imposition of a Tribal permit requirement, and an annual permit fee, cannot establish a consensual relationship under the first *Montana* exception. The second sentence of paragraph 123 quotes from the *Montana* decision, but Defendant denies that the second sentence is an accurate statement of the legal requirements of the first *Montana* exception. Answering the allegations of the third sentence of paragraph 123, Defendant denies that it asserts jurisdiction in this case based only on "three 'agreements,'" denies that those agreements do not establish a consensual relationship, and denies all remaining allegations of the third sentence of paragraph 123.

7. Tribal Jurisdiction Under the First *Montana* Exception is Available Only Where Necessary to Preserve Self-Government or to Control Internal Relations.

124. Even assuming that FMC's capitulation to the Tribes' coercive assertions of governmental authority could somehow establish a "consensual relationship," the first *Montana* exception does not apply unless the Tribes' regulation of conduct or activities on the FMC Property stems from the Tribes' inherent sovereign authority to preserve self-government or control internal relations. *Plains Commerce Bank,* 554 U.S. at 332.

ANSWER: Answering the allegations of paragraph 124, Defendant denies that the Tribes made coercive assertions of governmental authority, and denies that the first *Montana* exception contains a separate and additional requirement that the Tribes' regulation of conduct or activities on the FMC Property stem from the Tribes' inherent sovereign authority to preserve self-government or control internal relations.

125. In this case, Tribal regulation of FMC's activities is not necessary to preserve Tribal self-government or control the Tribes' internal relations. Therefore, Tribal jurisdiction does not exist under the first *Montana* exception.

ANSWER: Defendant denies the allegations of paragraph 125.

8. Consent Jurisdiction Cannot Override EPA Authority.

126. The Tribes also do not have jurisdiction over the conduct on the FMC Property under the first *Montana* exception because the activities the Tribes seek to regulate are directed by EPA, and EPA's decisions regarding final remedies under RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Chapter 103 ("CERCLA") are subject to review by the federal courts. The fee imposed by the Tribes is based on the "storage" or "disposal" of hazardous wastes on the FMC Property, but FMC's capping, closure and management of phosphorus-contaminated soils in at the FMC Property are activities directed by EPA under the RCRA Consent Decree and CERCLA administrative orders. The first *Montana* exception does not give the Tribes jurisdiction to second guess EPA.

ANSWER: Answering the allegations of the first sentence of paragraph 126, Defendant denies that the Tribes do not have jurisdiction to require FMC to obtain a waste storage permit and pay an annual permit fee of $1.5 million; denies that any other assertion of Tribal jurisdiction is at issue in this case; denies that the activities the Tribes seek to regulate are

directed by EPA. FMC's general allegation that EPA's decisions on final remedies under RCRA and CERCLA are subject to review by the federal courts is a legal conclusion to which no response is required but to the extent a response is required, denied. Answering the allegations of the second sentence of paragraph 126, Defendant admits that the permit fee it imposes on FMC is based on the storage of hazardous waste on the FMC Property, but denies that is the only basis for the imposition of the fee; and admits that the RCRA Consent Decree and the CERCLA administrative orders apply to certain activities of FMC, but denies any inference that the Consent Decree and the CERCLA administrative orders are inconsistent with the Tribes' imposition of the waste storage fee at issue in this case. Answering the allegations of the third sentence of paragraph 126, Defendant denies that it lacks jurisdiction over FMC under the first *Montana* exception, denies that it is exercising jurisdiction to second guess EPA, and denies that the existence of tribal jurisdiction under the second *Montana* exception depends on whether another government has concurrent jurisdiction over the same activities.

B. The Tribal Court of Appeals Violated Federal Law by Holding That Any Minimal Risk is Sufficient For Tribal Jurisdiction.

1. The Second *Montana* Exception Requires Proof That Non-Member Conduct Imperils the Subsistence of the Tribal Community.

127. The Tribes do not have civil regulatory jurisdiction over FMC under the second *Montana* exception because the Tribes did not show that FMC's conduct: (a) "menaces the political integrity, the economic security, or the health or welfare of the tribe," *Plains Commerce Bank,* 554 at 316; (b) "imperil[s] the subsistence of the tribal community," *Plains Commerce Bank,* 554 U.S. at 341; *Evans,* 736 F.3d at 1306; or (c) is "necessary to avert catastrophic consequences." *Plains Commerce Bank,* 554 U.S. at 341.

ANSWER: Defendant denies the allegation in paragraph 127 that the Tribes did not prove and do not have jurisdiction over FMC under the second *Montana* exception; the

remainder of paragraph 127 consists of selective quotations from judicial decisions which are extracted from their context, and Defendant denies that these quotations correctly state the requirements of the second *Montana* exception.

128. "The Tribes face a formidable burden in this respect, because with only `one minor exception, [the Supreme Court has] never upheld under *Montana* the extension of tribal civil authority over non-members on non-Indian land.'" *Evans,* 736 F.3d at 1303, *citing Plains Commerce,* 554 U.S. at 333.

ANSWER: Paragraph 128 alleges a conclusion of law to which no response is required, but to the extent a response is required, Defendant admits that the quotation in paragraph 128, which Plaintiff has extracted from its context, appears in the cited case, but denies that the quotation is referring to this case, and denies that it has any application to this case.

129. *Montana's* second exception "does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe." *Evans,* 736 F.3d at 1306 (quoting *Burlington N R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1064-65 (9th Cir. 1999)). Rather, the challenged conduct must be so severe as to "fairly be called catastrophic for tribal self-government." *Evans,* 736 F.3d at 1306 (quoting *Plains Commerce Bank, supra*).

ANSWER: Paragraph 129 alleges a conclusion of law to which no response is required, but to the extent a response is required, Defendant admits that the quotations in paragraph 129, which Plaintiff has extracted from the context in which they were made, appears in the cited case, but denies that these quotations have any application to this case, and denies that these quotations accurately state the requirements of the second *Montana* exception that apply in this case.

130. Tribal jurisdiction cannot be created by speculation that some unforeseen, future catastrophic event might create a threat to Tribal health and the environment. In *Evans,* the Ninth Circuit emphasized that jurisdiction under the second *Montana* exception cannot be founded on "generalized concerns" or "speculative" conjecture. Rather, the Ninth Circuit has stated that the Tribes must "provide specific evidence showing that tribal regulation . . . is necessary to avert catastrophe." *Evans,* 736 F.3d at 1306, n.8.

ANSWER: The first sentence of paragraph 130 alleges a conclusion of law to which no response is required, but to the extent a response is required, Defendant denies the allegations of the first sentence of paragraph 130 except to the extent that it alleges that a threat which is unknown and does not exist at the time that tribal jurisdiction is asserted cannot support an assertion of tribal jurisdiction that is based exclusively on the second *Montana* exception. The second and third sentences of paragraph 130 allege conclusions of law to which no response is required, but to the extent a response is required, Defendant asserts that the quotations in the second and third sentences of paragraph 130 appear in the cited case, but denies that these quotations, which Plaintiff has extracted from the context in which they were made, have any application to this case, and denies that these quotations accurately state the requirements of the second *Montana* exception.

131. As was the case in *Plains Commerce Bank,* the FMC Property has been owned by non-Indians for more than 50 years, during which time Tribal self-government has proceeded without interruption. The second *Montana* exception is inapplicable in this case.

ANSWER: Defendant denies the allegations of paragraph 131, except the allegation that that the FMC Property has been owned by non-Indians for more than 50 years, which Defendant admits.

2. The Tribal Court of Appeals Rejected the Federal Standards for Tribal Jurisdiction, and Instead Adopted a Standard Contrary to Federal Law.

132. Although the Ninth Circuit has stated that *Montana's* second exception "does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe," the Tribal Court of Appeals held the opposite, that any adverse effect whatsoever, whether actual or perceived, was sufficient to establish tribal jurisdiction. *Compare* April 15, 2014 Decision, pp. 19-28, *to Evans,* 736 F.3d at 1306.

ANSWER: Answering the allegations of paragraph 132, Defendant admits that the Court of Appeals for the Ninth Circuit made the quoted statement in the cited case, but denies that "the Tribal Court of Appeals held the opposite, that any adverse effect whatsoever, whether actual or perceived, was sufficient to establish tribal jurisdiction."

133. The Tribal Court of Appeals' error is clear throughout its Decision. That Court did not ask whether risk "imperil[ed] the subsistence of the Tribes," but rather whether all risk had been completely "eliminated." *Compare* April 15, 2014 Decision, pp. 19-28, *to Plains Commerce Bank,* 554 U.S. at 341 and *Evans,* 736 F.3d at 1306.

ANSWER: Answering the allegations of the first sentence of paragraph 133, Defendant denies that the Tribal Court of Appeals erred, and denies that the error alleged here "is clear throughout the Decision." Defendant denies the allegations of the second sentence of paragraph 133, which inaccurately characterizes and misstates by omission the holding of the Tribal Court of Appeals' April 15, 2014 Decision.

134. The Court rejected consideration of EPA's actions to ensure protection, April 15, 2014 Decision, p. 23, as well as the "statistical analysis or scientific measurement" of risks, April 15, 2014 Decision, p. 30. It considered instead whether there was even "a mere possibility that the non-Indian owner's intended use of the fee land would in the future

impinge upon the tribal members' cultural and religious traditions." April 15, 2014 Decision, p. 30.

ANSWER: Defendant denies the allegations of paragraph 134, which extracts quotations from their context, inaccurately characterizes and misstates by omission the April 15, 2014 Decision.

135. The Tribal Court of Appeals found that the EPA's selected interim remedy would only "reduce" the risks to human health and the environment, and would not "eliminate" those risks. April 15, 2014 Decision, p. 23. Such a reduction of risk was not sufficient to avoid tribal jurisdiction, regardless of how low the risk was, because the erroneous new standard required not only complete elimination of all risk, but also complete elimination of all perception of risk. April 15, 2014 Decision, p. 24, 30.

ANSWER: Answering the allegations of the first sentence of paragraph 135, Defendant admits that FMC's activities present risks to human health and the environment; admits that EPA found that its selected remedy was designed to reduce that risk and that the Tribal Court of Appeals found that the reduction of a risk does not eliminate it, April 15, 2014 Decision at 23, but denies Plaintiff's characterization of the April 15, 2014 Decision. Defendant denies the allegations of the second sentence of paragraph 135 that the Tribal Court of Appeals applied an "erroneous new standard [that] required not only complete elimination of all risk, but also complete elimination of all perception of risk," admits that EPA's announced intention to reduce the risk does not defeat Tribal jurisdiction, and denies that the Tribal Court of Appeals held that this was so regardless of how low the risk was.

136. Further, the Court ruled that the question of whether tribal customs have been adversely affected "cannot be measured by EPA standards," since such scientific standards are "non-Indian measurements." April 15, 2014 Decision, p. 29.

ANSWER: Defendant admits that the April 15, 2014 Decision found that "the question whether tribal sacred customs and traditions have been adversely affected cannot be measured by EPA standards," *id.* at 29, but denies that allegations of paragraph 136 accurately recites that finding. Defendant also denies Plaintiff's assertion that the reason for the finding (misstated by Plaintiff) in paragraph 136 was that EPA standards are "non-Indian measurements."

137. Under the Court's flawed standard, all that is required for a tribe to have jurisdiction over a non-member is either: (a) that there is any risk whatsoever from conduct on the non-member's property; or (b) that a Tribal member perceive that there is any possibility that the non-member's conduct might impinge on the Tribal member's traditions. (April 15, 2014 Decision, pp. 19-31). These rulings violate federal law as decreed by the United States Supreme Court and the Ninth Circuit.

ANSWER: Defendant denies that the Tribal Court of Appeals' standard is flawed, and denies the remainder of the allegations of the first sentence of paragraph 137. Defendant denies the allegations of the second sentence of paragraph 137, and denies that the second sentence correctly states the holding of the Tribal Court of Appeals. Defendant denies the allegations of the third sentence of paragraph 137.

3. Far From Imperiling the Subsistence of the Tribal Community, the FMC Property Poses No Risk To the Tribes' Health and Welfare.

138. Although wastes from the production of elemental phosphorus are present on the FMC Property, there is no evidence that these substances have ever caused harm or created undue risk of harm outside the FMC Property boundaries. Without such evidence, the Tribes

cannot meet their burden of proving that the FMC Property imperils their subsistence as a Tribal community.

ANSWER: Defendant admits that wastes from the production of elemental phosphorus are present on the FMC Property, but denies the remaining allegations of the first sentence of paragraph 138. Defendant denies the allegations of the second sentence of paragraph 138, including Plaintiff's characterization of the legal requirements of the second *Montana* exception.

139. EPA is the federal agency responsible for implementing federal environmental laws, including RCRA and CERCLA, to protect human health and the environment, to protect both the Tribal and non-Tribal communities in Southeast Idaho. EPA's exercise of its authority over the FMC Property protects the Tribes and Tribal members from adverse or catastrophic consequences.

ANSWER: Answering the allegations of the first sentence of paragraph 139, Defendant admits that EPA is responsible for implementing RCRA and CERCLA for the general purposes alleged, denies that those statutes direct EPA to do so for the specific purpose of protecting Tribal and non-Tribal communities in Southeast Idaho, and denies that EPA is the only federal agency responsible for implementing federal environmental laws to protect human health and the environment. Defendant denies the allegations of the second sentence of paragraph 139.

140. EPA has extensively studied the FMC Property for the last 25 years and has required remedial actions at the FMC Property to protect human health and the environment. EPA has regularly consulted with the Tribes regarding the development and selection of these actions, meeting its federal trust responsibility to the Tribes. EPA has entered into a written Memorandum of Understanding ("MOU") with the Tribes as part of the CERCLA process to

formally establish parameters for consultation, communication, and funding in support of the Tribes' participation in the regulatory process.

ANSWER: Answering the allegations of the first sentence of paragraph 140, Defendant admits that EPA has studied the FMC Property but is without knowledge or information sufficient to determine the truth of the allegation in the first sentence of paragraph 140 that EPA has extensively studied the FMC Property for the last 25 years (allegedly since 1989), and therefore denies that allegation; Defendant admits that EPA has ordered that remedial actions be undertaken at the FMC Property, but denies that all such actions have been completed, and denies that the actions that have been ordered have been effective to protect human health and the environment. Answering the allegations of the second sentence of paragraph 140, Defendant denies that EPA has regularly consulted with the Tribes for the last 25 years regarding the development and selection of the remedial actions it has ordered be taken at the FMC Property, and denies that EPA has met its trust responsibility to the Defendant by consulting with Defendant to the extent that EPA has done so. Answering the allegations of the third sentence of paragraph 140, Defendant admits that EPA entered into a Memorandum of Understanding with Defendant but denies the characterization of that agreement that is alleged in this sentence.

a. EPA Regulation of the FMC Property Under CERCLA.

141. As a result of the long history of manufacturing phosphorus products by FMC and the adjacent phosphate fertilizer plant operated by the J.R. Simplot Company ("Simplot"), EPA added the Eastern Michaud Flats Superfund Site ("EMF Superfund Site") to the CERCLA National Priorities List in 1989. FMC, Simplot and EPA entered into a CERCLA Administrative Order on Consent ("1991 AOC") in May 1991, under which the companies agreed to conduct a remedial investigation/feasibility study ("RI/FS") for the entire EMF Superfund Site. During the 1997 Feasibility Study, the EMF Superfund Site was divided into

three "Subareas": (a) the FMC Operable Unit ("FMC OU"), comprising the FMC Property; (b) the Simplot Operable Unit ("Simplot OU"), comprising the Simplot owned properties ("Simplot Plant"); and (c) the Off-Plant Operable Unit ("Off-Plant OU"), comprising property not owned by Simplot or FMC.

ANSWER: Answering the allegations of the first sentence of paragraph 141, Defendant admits that EPA added the EMF Superfund Site to the CERCLA National Priorities List, but this was done in 1990, not 1989; Defendant denies that EPA did so as a result of the long history of FMC's and Simplot's manufacturing of phosphorus products, and asserts that the reasons EPA did so are stated in the announcement of the listing. *See* National Priorities List for Uncontrolled Hazardous Waste Sites, 55 Fed. Reg. 35,502-12 (Aug. 30, 1990). Answering the allegations of the second sentence of paragraph 141, Defendant admits that the EMF Superfund site was divided into three "Subareas" during the 1997 Feasibility Study, but denies that the Off-Plant Subarea was established as an operable unit separate from the FMC OU and the Simplot OU at that time.

142. After completion of the RI/FS, in June 1998 EPA issued a Record of Decision (the "June 1998 ROD") for the EMF Superfund Site, which was only implemented for the Simplot site. After its plant shutdown in December 2001, FMC agreed to conduct a supplemental remedial investigation and supplemental feasibility study ("SRI/SFS").

ANSWER: Defendant admits the allegations of paragraph 142, except the allegation that the plant shutdown in December 2001, which is denied for reasons previously stated, and asserts that the SRI/SFS was performed pursuant to an Administrative Order on Consent ("AOC") issued by EPA in 2003.

143. The SRI/SFS culminated in September 2012 with EPA's issuance of an Interim Record of Decision Amendment ("IRODA") that sets forth EPA's selected soil and groundwater interim remedy to address hazardous substances at the FMC OU, including elemental phosphorus, arsenic and other contaminants. In the IRODA, EPA states that:

> The selected interim amended remedy is protective of human health and the environment by eliminating, reducing, or controlling risks posed by the FMC OU through containment of contaminated soils, engineering controls, and institutional controls; installation and operation of a groundwater extraction and treatment system; and long-term groundwater monitoring and gas monitoring.

IRODA, p. 73.

ANSWER: Answering the allegations of the first sentence of paragraph 143, Defendant admits that the hazardous substances at the FMC OU include elemental phosphorus, arsenic and other contaminants, and admits that the IRODA set forth EPA's selected soil and groundwater interim remedy, but denies that it addresses all hazardous substances at the FMC OU; Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation that the IRODA was the culmination of the SRI/SFS and therefore denies that allegation. Defendant denies the allegations of the second sentence of paragraph 143 because while the IRODA contains the quoted language, the quotation that appears in this sentence omits EPA's discussion of unacceptable risks, and its plans to reduce those risks, *see* IRODA, § 11.1 at 73, and therefore mischaracterizes the IRODA.

b. The FMC Property Has Not Caused Any Human Health Effect or Environmental Harm Outside FMC Property Boundaries.

144. There was no evidence presented to the Tribal Court of Appeals that wastes from elemental phosphorus production process at FMC since inception of operations in 1949 have caused any health effects outside the FMC Property. In spite of a 65-year history, the Tribes cannot provide any evidence of any adverse impact on the Tribal community.

ANSWER: Defendant denies the allegations of paragraph 144, which concern health effects that FMC agreed to study in the RCRA Consent Decree, but that study has not been completed.

145. Elemental phosphorus is pyrophoric, which means that it spontaneously combusts when exposed to air. For the entire time the Pocatello Plant operated, water used to prevent combustion of elemental phosphorus was managed in large surface water impoundments. These are referred to as the RCRA and CERCLA Ponds.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 145. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the second sentence of paragraph 145, and therefore denies that allegation. Defendant admits the allegations of the third sentence of paragraph 145.

146. The RCRA Ponds are those that were utilized for waste disposal after RCRA requirements became applicable to the Pocatello Plant in 1990. FMC had closed all of the RCRA Ponds by 2005 in accordance with RCRA Consent Decree.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation that RCRA requirements did not become applicable to the Pocatello Plant until 1990 and therefore denies that allegation. Defendant admits the remaining allegations of paragraph 146.

147. The CERCLA Ponds were older, smaller and unlined, unlike most of the RCRA Ponds, which were newer, larger, and lined. The CERCLA ponds were operated before RCRA requirements became applicable that required ponds to be lined to prevent release. Those ponds stopped receiving wastes before RCRA requirements became applicable in 1990. The CERCLA Ponds are being remediated as part of EPA's 2012 IRODA.

ANSWER: Answering the allegations of the first sentence of paragraph 147, Defendant admits that the CERCLA Ponds are older and smaller than the RCRA Ponds and unlined; Defendant admits that not all of the RCRA Ponds are lined. Answering the allegations of the second sentence of paragraph 147, Defendant denies that RCRA requires only that ponds be lined to prevent release, but otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the second sentence of paragraph 147 and therefore denies those allegations. Answering the allegations of the third sentence of paragraph 147, Defendant admits that the CERCLA Ponds stopped receiving waste before 1990, but lacks knowledge or information sufficient to form a belief about the truth of the allegation that RCRA requirements did not become applicable until 1990 and therefore denies that allegation. Answering the allegations of the fourth sentence of paragraph 147, Defendant denies that the remediation of the CERCLA Ponds that is directed by the IRODA has been accomplished to date, and lacks knowledge or information sufficient to form a belief about the truth of the allegation that the CERCLA Ponds are being remediated and therefore denies that allegation.

148. Sediments in the CERCLA and RCRA Ponds contain elemental phosphorus at levels that may spontaneously combust if exposed to air. Elemental phosphorus also leaked out of the former Pocatello Plant furnace building and migrated to soils in the former furnace building area at levels that may spontaneously combust if exposed to air. Other substances, including arsenic, other metals and radiological elements are present at the FMC Property as a result of manufacturing activities.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 148. Defendant admits the allegations of the second sentence of paragraph 148, but denies that elemental phosphorus is present in the soils only in the former furnace building area. Defendant

admits the allegations of the third sentence of paragraph 148, asserts that the "other substances" present at the FMC Property include elemental phosphorus and denies that the substances referred to in this sentence are present at the FMC Property only as a result of manufacturing activities.

149. Although those substances—metals, radiological elements, elemental phosphorus in soils, arsenic in groundwater—have been present on the FMC Property for 65 years, the Tribes did not offer any proof that any of these substances have caused, or are likely to cause, any harm to the Tribes or to any Tribal member.

ANSWER: Answering the allegations of paragraph 149, Defendant denies that the substances identified in paragraph 149 are the only contaminants on the FMC Property, admits that the substances identified in paragraph 149 have been present on the FMC Property for 65 years, and denies the remaining allegations of paragraph 149, which concern health effects that FMC agreed to study in the RCRA Consent Decree, but that study has not been completed.

c. Human Health Studies Establish That Contamination Present at the FMC Property Has Not Adversely Impacted the Health of Former FMC Pocatello Plant Workers or Tribal Members.

150. Given that the FMC Property has been contaminated for most of the last 65 years, the evidence of harm—if any had occurred—would be clear, indisputable and provable by scientifically-measurable facts.

ANSWER: Answering the allegations of paragraph 150, Defendant admits that the FMC Property has been contaminated for most of the last 65 years, denies that there is no evidence of harm from the contamination of the FMC Property, denies that no harm has occurred, denies that all harm "would be clear, indisputable and provable by scientifically-measurable facts," and asserts that FMC agreed to study these harms in the RCRA Consent Decree but that study has not been completed.

151. The Tribal Court of Appeals explained that FMC's evidentiary case had been offered "to demonstrate that there has been no evidence presented to demonstrate that any tribal members have actually suffered any negative effects from the FMC OU." (April 15, 2014 Decision, p. 19). The response of the Tribal Court of Appeals to this was that the Tribes did not need to prove that Tribal members had actually suffered negative physical effects from the threatened conduct. (April 15, 2014 Decision, p. 19).

ANSWER: Answering the allegations of the first sentence of paragraph 151, Defendant denies that the Tribal Court of Appeals stated that FMC's evidentiary case had been offered only for the reason stated in the selective quotation that appears in this sentence, as the whole sentence demonstrates that the Court was referring only to certain questioning of witnesses by FMC at trial, not to the whole of FMC's evidentiary case. April 15, 2014 Decision at 19. Answering the allegations of the second sentence of paragraph 151, Defendant denies that the Tribal Court of Appeals' response was as alleged by Plaintiff, as the Court instead stated that FMC's reasoning in offering this evidence was "understandable and relevant," and then ruled that the second *Montana* exception could be satisfied by a showing of direct impact or "the threat thereof. *Id.* Answering the allegations of paragraph 151 as a whole, Defendant denies that the opinions of the Tribal Court of Appeals can be characterized by the use of selective and incomplete quotations, as is alleged here.

152. In other words, the Tribal Court of Appeals shifted from looking for evidence of harm, and instead based its decision the *threat* of harm. (April 15, 2014 Decision, p. 19). This shift was necessary because human health studies conducted over a long period of time prove that the FMC Property has not adversely impacted Tribal health, welfare or the environment.

ANSWER: Answering the allegations of the first sentence of paragraph 152, Defendant denies that the Tribal Court of Appeals did not look for, consider, and find evidence of harm, and denies that its decision was based only on the threat of harm. *See* April 15, 2014 Decision at 29-32; May 16, 2014 Findings and Conclusions at 13-15. Answering the allegations of the second sentence of paragraph 152, Defendant denies that the alleged "shift" was made by the Tribal Court of Appeals, denies that the alleged "shift" was made for the reasons stated, and denies that "human health studies conducted over a long period of time prove that the FMC Property has not adversely impacted Tribal health, welfare or the environment." As previously stated, FMC agreed to study the health effects of its contamination of the Reservation in the RCRA Consent Decree, but that study has not been completed.

153. Long-term human health studies have not found any evidence of adverse health impacts to Pocatello Plant workers—the most exposed population, and the population that most likely would be the first to manifest any adverse health impacts.

ANSWER: Defendant denies the allegations of paragraph 153.

154. Epidemiology is the science that studies the patterns, causes, and effects of health and disease conditions in defined populations. It is the cornerstone of public health, and informs policy decisions and evidence-based practice by identifying risk factors for disease and targets for preventive healthcare.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 154. Defendant admits the allegation that epidemiology identifies risk factors for disease, and targets for preventive healthcare, but is otherwise without knowledge or information sufficient to determine the truth of the general allegations made in the second sentence of paragraph 154, and therefore denies those allegations.

155. Between 1977 and 2000, independent epidemiologists from the University of Minnesota conducted multiple epidemiological human health studies of Pocatello Plant workers. Those studies establish that long-term exposure to the contaminants at the FMC Property did not cause any adverse health impacts to those workers whose exposures would be many times that of community members outside the Plant boundaries.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 155 as neither the studies to which Plaintiff refers, nor the authors of such studies are identified, and Defendant therefore denies those allegations. Defendant denies the allegation in the second sentence of paragraph 155 that workers' exposure to the contaminants at the FMC Property would be many times that of community members outside the Plant boundaries.

156. In 2006, the Oregon Health & Science University and the Northwest Portland Area Indian Health Board conducted an independent human health study of the Tribal community. That study failed to find adverse health impacts to Tribal members that could be attributed to contamination at the FMC Property.

ANSWER: Defendant admits the allegation in the first sentence of paragraph 156 that the Oregon Health & Science University and the Northwest Portland Area Indian Health Board conducted a health study in 2006, but denies the characterization of that study which is alleged in the remainder of the first sentence. Defendant denies the allegations of the second sentence of paragraph 156 because the 2006 study was not intended "to find adverse health impacts to Tribal members that could be attributed to contamination at the FMC Property." The ongoing subjects of the ongoing Fort Hall Environmental Health Assessment, which is required by the RCRA Consent Decree but has not been completed, is to study "the potential human health effects on

residents of the Fort Hall Reservation that may have resulted from releases of hazardous substances from RCRA waste management units and either sources of the FMC Pocatello facility." RCRA Consent Decree, Attachment B § II.14.

d. Extensive Studies Conducted Under EPA Direction and Supervision Show That Tribal Members Have Not Been Subjected to Risk From FMC's Activities on the FMC Property.

157. EPA's 2012 Interim Remedy is designed to provide additional protection *for future workers* at the FMC Property after it is redeveloped.

ANSWER: Answering the allegations of paragraph 157, Defendant denies that EPA's 2012 Interim Remedy has been fully designed, and otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 157, and therefore denies those allegations.

158. Tribal members do not reside at or near the FMC Property. Undisputed demographic evidence shows that the area immediately surrounding the FMC Property is sparsely populated, and that the relatively small population located there is predominantly non-Indian.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 158 because under the Treaty of Jul. 3, 1868, 15 Stat. 673 ("1868 Treaty"), the Fort Hall Reservation was secured for the Tribes and their members as "their permanent home," *id*., art. 4, and the use of the Reservation, including by Tribal members as their home, includes the use of its lands, waters, and natural resources for subsistence, cultural and ceremonial purposes, and therefore includes the entire Reservation, including the area surrounding the FMC Property. If the term "reside" as used in this sentence is instead intended to refer only to the location of homes occupied by a Tribal member, Defendant lacks knowledge or information sufficient to form a

belief about the truth of the allegation because "near" is a relative term which is not defined, and Defendant therefore denies that allegation. Defendant denies the allegations of the second sentence of paragraph 158 to the extent that it is based on census data only, and otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the second sentence of paragraph 158 and therefore denies that allegation.

159. Although parts of the FMC Property are within the boundaries of the Fort Hall Reservation, Tribal members have no right to access the FMC Property for any cultural or Tribal use. As a result, exposure to Tribal members is limited to the Off-Plant OU and areas outside FMC Property boundaries.

ANSWER: Answering the allegations of the first sentence of paragraph 159, Defendant admits that parts of the FMC Property are on the Reservation; the allegation that Tribal Members have no right to access the FMC Property for any cultural or Tribal use is a legal conclusion to which no response is required, but to the extent a response is required, denied. Defendant denies the allegations of the second sentence of paragraph 159.

160. After exhaustive study, EPA concluded that the concentrations of contaminants in soils, surface water, and air in the Off-Plant OU related to FMC's operations do not present a risk: (a) no off-site drinking water wells are contaminated from any substances emanating from the FMC Property; (b) sampling conducted in 2012 and 2013 establishes that the groundwater in the Off-Plant OU already meets federal drinking water quality criteria; (c) the Simplot OU is the source of 95% of total arsenic and more than 95% of the total phosphorus mass loading to EMF Superfund Site-impacted groundwater flowing into the Portneuf River; (d) fluoride is the only ecological contaminant of concern emitted via air found in the Off-Plant OU at levels of potential ecological concern; but EPA has determined that fluoride levels from the EMF

Superfund Site are "below ecological levels of concern," and after 2001, Simplot became the sole source of fluoride emissions; (e) measurements of the radioactivity in the Off-Plant OU establish that radium-226 levels are not a risk to human health or the environment; and (f) Tribal members have not been exposed to phosphine gas, as shown by approximately 40,000 measurements of phosphine gas emissions taken since 2008 that show no detections of phosphine (0.00 parts per million) at the FMC property fence line.

ANSWER: Answering the allegations of paragraph 160, Defendant admits that FMC has contaminated soils, surface water, and air in the Off-Plant OU; denies that EPA has found that those contaminants do not present a risk; and denies that the remainder of paragraph 160 accurately characterizes EPA's conclusions, as set forth in the 2013 UAO, the IRODA, the 2010 UAO, the 2006 UAO, the RCRA Consent Decree, and the 1991 AOC.

161. The Agency for Toxic Substances and Disease Registry ("ATSDR") evaluated air quality impacts from the EMF Site in 2005 after the shutdown of the Pocatello Plant. The ATSDR found that the EMF Superfund Site currently presents no public health hazard.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 161, except to the extent that it alleges all operations of the Pocatello Plant have been shutdown, which is denied, and denies the allegations of the second sentence of paragraph 161.

4. Far From Allowing Any Catastrophe, EPA Exercises Extensive Oversight to Ensure That Human Health is Fully Protected.

162. Lacking evidence of any present or past harm to the Tribes, the Tribal Court of Appeals focused on whether there might be a future threat of harm to the Tribes.

ANSWER: Answering the allegations of paragraph 162, Defendant denies that the case presented to the Tribal Court of Appeals was "[l]acking evidence of any present or past harm to the Tribes," denies that the alleged lack of evidence caused the Tribal Court of Appeals to

"focus[] on whether there might be a future threat of harm to the Tribes," and denies the characterization of the Tribal Court of Appeals decision that is alleged in this paragraph.

163. At the same time, the Tribal Court of Appeals held that remedial efforts designed to ensure that no harm will occur in the future were not relevant. (April 15, 2014 Decision, p. 18). This contradictory reasoning prevented the Tribal Court of Appeals from understanding that, even if there were some future risks, EPA's oversight assures that such future threats would be addressed to prevent the health of the Tribal community from being imperiled.

ANSWER: Answering the allegations of the first sentence of paragraph 163, Defendant denies that "the Tribal Court of Appeals held that remedial efforts designed to ensure that no harm will occur in the future were not relevant," and denies that all remedial efforts required by the IRODA have been designed. Answering the allegations of the second sentence of paragraph 163, Defendant denies that the Tribal Court of Appeals reasoning was contradictory, denies that the alleged contradictory reasoning "prevented the Tribal Court of Appeals from understanding that, even if there were some future risks, EPA's oversight assures that such future threats would be addressed to prevent the health of the Tribal community from being imperiled," and denies that EPA's oversight provides such assurance.

a. EPA's Implementation of RCRA at the FMC Property Prevents Any Harm to the Tribal Community.

164. RCRA is a federal law that addresses management, treatment, and disposal of hazardous wastes. In 1997, EPA and the DOJ alleged that certain aspects of the Pocatello Plant operations violated RCRA. FMC, EPA and DOJ entered into negotiations to resolve the alleged RCRA violations. The Tribes participated in this effort, both by attending negotiations between FMC, EPA and DOJ, and by meeting separately with EPA and DOJ regarding the requirements to be imposed on FMC.

ANSWER: Defendant admits the allegations of paragraph 164.

165. In 1998, FMC, EPA, and DOJ resolved alleged violations of RCRA and completed negotiation of the RCRA Consent Decree, with the full and active participation of the Tribes. The RCRA Consent Decree set forth the requirements for operation and closure of FMC's RCRA-regulated ponds. The RCRA Consent Decree included requirements that the Tribes asked EPA and DOJ to include, as well as requirements with which the Tribes did not agree. The RCRA Consent Decree was filed with the District Court.

ANSWER: Answering the allegations of the first sentence of paragraph 165, Defendant admits that "[i]n 1998, FMC, EPA, and DOJ resolved alleged violations of RCRA and completed negotiation of the RCRA Consent Decree," but asserts that in the RCRA Consent Decree FMC did not admit the truth of any allegation of the RCRA complaint filed by the United States against FMC, and did not admit liability; Defendant denies that the Tribes were full and active participants in all of the RCRA Consent Decree negotiations. Defendant admits the allegations of the second sentence of paragraph 165. Defendant admits the allegations of the third and fourth sentences of paragraph 165.

166. The Tribes filed a motion to intervene to oppose entry of the proposed RCRA Consent Decree. The District Court granted the Tribes' request to intervene.

ANSWER: Defendant admits the allegations of paragraph 166.

167. On July 13, 1999, the District Court entered an order rejecting the Tribes' objections and entering the RCRA Consent Decree. The District Court ruled that the trust responsibilities of the EPA and the United States do not allow the Tribes to prescribe the environmental regulatory measures the United States should pursue. (July 13, 1999 Order, CV-98-0406-E-BLW, at 2).

ANSWER: Defendant admits the allegations of the first sentence of paragraph 167. Defendant admits that this Court rejected the Tribes' objections to the entry of the RCRA Consent Decree that were based on the trust responsibility, but denies the characterization of that ruling that is set further in the second sentence of paragraph 167.

168. The District Court also disagreed with the Tribes' assertions that FMC should be forced to remove elemental phosphorus wastes from the ponds, instead of closing and capping the ponds with the waste in place, stating: "The Court is convinced that the capping requirements are adequately environmentally protective — the record contains no legitimate basis on which the Court could conclude that capping allows an unreasonable health risk to go unchecked." (July 13, 1999 Order, CV-98-0406-E-BLW, at 2-3).

ANSWER: Answering the allegations of paragraph 168, Defendant admits that this Courts July 13, 1999 Order contains the quoted language, but denies the characterization of this Court's July 13, 1999 Order that appears in this paragraph.

169. The Tribes appealed the District Court's entry of the RCRA Consent Decree. The Ninth Circuit affirmed the District Court's entry of the Decree. *United States v. Shoshone-Bannock Tribes,* 229 F.3d 1161 (9th Cir. 2000) (unpublished).

ANSWER: Defendant admits the allegations of paragraph 169.

170. Between 1999 and 2005, FMC completed closure and capping of the RCRA Ponds pursuant to EPA-approved closure plans. In 2005, FMC certified final closure of the last of the RCRA Ponds in accordance with EPA-approved closure plans.

ANSWER: Defendant admits the allegations of paragraph 170.

b. When Phosphine Gas Was Detected On the FMC Property, EPA Acted Promptly to Direct a Response, and FMC Implemented a Response to Eliminate Any Danger.

171. In 2006, elevated levels of phosphine gas were detected in a closed RCRA Pond. In response, EPA required FMC to: (a) install a gas extraction treatment system and achieve the performance standards set by EPA; (b) develop and implement a plan to monitor gas releases at the RCRA Ponds; and (c) perform a Site-Wide Phosphine Assessment Study in the RCRA Pond area and all areas subject to the CERCLA remedial investigations.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 171. Defendant denies that the remaining allegations of paragraph 171 accurately characterize the actions EPA required FMC to take in the 2006 UAO and the 2010 UAO.

172. FMC performed all the work required in compliance with EPA Unilateral Administrative Orders, including air monitoring and soil gas monitoring in the RCRA Pond areas, air monitoring at the FMC Property fenceline, and air monitoring and soil gas monitoring in the CERCLA areas. This monitoring showed that phosphine gas did not present a threat to public health: (a) at the CERCLA areas, a total of 420 soil gas readings were taken and all measurements were below the permissible exposure limit for phosphine gas. All hydrogen cyanide results were non-detect; (b) breathing zone samples taken in the RCRA Pond and CERCLA areas were all non-detect (0.00 ppm) for phosphine gas; and (c) air monitoring was conducted at FMC Plant Property fence line between 2008 to 2011 and consisted of more than 40,000 readings. All fence line monitoring results were non-detect (0.00 ppm) for phosphine gas.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 172. Defendant denies the allegation of the second sentence of paragraph 172 that phosphine gas does not present a threat to public health, denies the allegation in that sentence that the monitoring

done by FMC showed that phosphine gas and hydrogen cyanide do not present a public health threat, and lacks knowledge or information sufficient to form a belief about the remaining allegations and therefore denies those allegations.

173. Gas extraction and treatment conducted by FMC at closed RCRA Ponds ensures the protection of human health and the environment by removing and treating gas from within the capped pond to prevent its release at levels that might pose a risk to human health and the environment.

ANSWER: Defendant denies the allegations of paragraph 173.

174. This response of EPA and FMC to elevated levels of phosphine gas demonstrates that EPA acts promptly to direct a response to any potential risk that could develop, and follows up to ensure the response is fully protective of human health and the environment.

ANSWER: Defendant denies the allegations of paragraph 174.

c. EPA's Implementation of CERCLA at the FMC Property Prevents Any Harm to the Tribal Community.

175. During the CERCLA process that began in 1989, EPA consistently took appropriate enforcement actions to ensure that FMC performed the work required to comply with CERCLA requirements. EPA required that FMC develop work plans that met CERCLA criteria and described the specific work to be performed. After EPA approval of the work plans, the enforcement orders directed FMC to conduct the specified work.

ANSWER: Defendant admits the allegations of paragraph 175.

176. During the initial RI, FMC and Simplot performed extensive sampling and analyses of surface and subsurface soils, groundwater, surface water, sediment, aquatic and terrestrial ecology and air, including 60,000 groundwater analyses, 3,600 air samples, 7,500 surface water and sediments analyses, and soil samples along 16 compass directions up to more

than 3 miles from the FMC and Simplot plant boundaries. During the initial RI, FMC and Simplot developed a number of EMF Superfund Site studies and reports, including the final *Remedial Investigation Report for the EMF Superfund Site* (1996).

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the first sentence of paragraph 176, and therefore denies those allegations. Defendant admits the allegations of the second sentence of paragraph 176, except with regard to the work done by Simplot, with respect to which Defendant is without knowledge or information sufficient to form a belief about the truth of those allegations, and therefore denies those allegations.

177. EPA conducted the baseline ecological and human health risk assessments concurrently with the companies' RI/FS work, and reported those risk assessments in the *Baseline Human Health Risk Assessment* (1996) and the *Ecological Risk Assessment* (1996). These risk assessments were incorporated into the *FMC Subarea FS Report (1997)* and the 1998 ROD.

ANSWER: Defendant admits the allegations of paragraph 177.

178. EPA, the Idaho Department of Environmental Quality ("IDEQ") and the Tribes reviewed and commented on the draft reports that FMC submitted to EPA. FMC then prepared one or more revised reports, culminating in final reports that EPA approved.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in paragraph 178, and therefore denies those allegations.

179. After the Pocatello Plant was shut down, EPA required FMC to perform a SRI/SFS that included the former Plant operating areas. Those areas had not been identified for remedial action in the 1998 ROD because processing operations were ongoing at that time.

EPA also required FMC to conduct more remedial investigations and feasibility studies regarding areas previously studied to generate additional data needed for EPA's potential amendment of the remedy it had selected for the FMC OU in the 1998 ROD.

ANSWER: Defendant admits the allegations of the first and third sentences of paragraph 179, except the allegation in the first sentence that the Pocatello Plant was shut down, which is denied for reasons previously stated. Defendant denies the allegations of the second sentence of paragraph 179.

180. FMC conducted the SRI field work between May 2007 and August 2010. During the SRI, FMC (a) installed 902 soil borings; (b) collected 1,456 soil samples; (c) performed 24,009 laboratory analyses; (d) performed 500 radon measurements; and (e) performed 663,779 gamma dose rate measurements.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 180, and therefore denies those allegations.

181. FMC submitted and EPA approved FMC's *Supplemental RI Report* (May 2009), including the *SRI Addendum Report* (November 2009), the *Groundwater Current Conditions Report* (June 2009) and the *Site-Wide Gas Assessment Study Report* (January 2011).

ANSWER: Defendant admits the allegations of paragraph 181.

182. EPA also required and FMC performed a Supplemental Feasibility Study ("SFS"). FMC submitted the *Supplemental FS Report* that evaluated the potential remedial alternatives using CERCLA remedy selection criteria, to identify a preferred alternative that addressed both human health and environmental risks at the FMC OU. EPA approved the FMC SFS Report on July 18, 2011.

ANSWER: Defendant admits the allegations of paragraph 182.

183. Based on the data, analyses and studies performed during the RI/FS completed in 1997 and the SRI/SFS completed in 2011, EPA determined that the nature and extent of contamination at the FMC OU had been sufficiently characterized to evaluate and select specific remedial actions for this area.

ANSWER: Defendant admits the allegations of paragraph 183, but denies that the nature and extent of contamination at the FMC OU had been sufficiently characterized and analyzed to evaluate specific remedial actions for the FMC OU.

d. EPA Selected a Remedy That Is Protective of Human Health and the Environment.

184. Based on all of the RI/FS and SRI/SFS investigations, studies, sampling, monitoring, and evaluations of the various alternatives for remediation, EPA selected a remedy for the FMC Property that would be protective of human health and the environment. In September 2011, EPA released its Proposed Plan for FMC OU Interim Remedy, after having first provided the Tribes with an advance copy for their review and comment.

ANSWER: Answering the allegations of the first sentence of paragraph 184, Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in that sentence concerning the basis on which EPA selected a remedy for the FMC Property, and therefore denies that allegation; Defendant denies that the remedy selected by EPA – which has not been implemented – would be protective of human health and the environment. Defendant admits the allegations of the second sentence of paragraph 184.

185. During 2011 and 2012, senior members of EPA Region 10, EPA Headquarters, and the White House met with the Tribes on several occasions to provide the Tribes with the full

opportunity to ask questions and to discuss the Tribes' comments, concerns and suggestions regarding the Proposed Plan.

ANSWER: Defendant denies the general characterization of the Tribes' meetings with various federal officials that is alleged in paragraph 185, and denies the allegation that such meetings as were held with federal officials in 2011 and 2012 "provide[d] the Tribes with the full opportunity to ask questions and to discuss the Tribes' comments, concerns and suggestions regarding the Proposed Plan."

186. In September 2012, after careful evaluation of the comments provided to EPA on the Proposed Plan by the Tribes and others, including comments made at public hearings held at Fort Hall, Idaho and Chubbuck, Idaho, EPA published the IRODA. The IRODA is "Interim" in part because EPA has committed to perform additional studies, in full and active coordination with the Tribes, before deciding on the final CERCLA remedial action.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 186. Defendant admits the allegations of the second sentence of paragraph 186 except the allegation that the additional studies EPA will perform will be conducted in full and active coordination with the Tribes, as whether that is so cannot be known now, and therefore denies that allegation.

187. The Interim Remedy selected by EPA on behalf of the United States will be protective of the human health and the environment—both for the Tribal community and the surrounding communities. Further, the Interim Remedy will result in immediate actions that will protect human health, without compromising or otherwise interfering with the final CERCLA remedial action that will be selected by EPA in the future.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 187, which purports to evaluate the effectiveness of a remedy that has not been implemented or even fully designed. Defendant denies that the Interim Remedy, which was issued over two years ago, will result in immediate action that will protect human health, as alleged in the second sentence of paragraph 187. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the second sentence of paragraph 187 that the Interim Remedy will not "compromise[e] or otherwise interfere[e] with the final CERCLA remedial action that will be selected by EPA in the future," and therefore denies that allegation.

188. EPA's selected Interim Remedy requires remedial action only within the FMC OU, including: (a) installation of engineered evapotranspiration ("ET") soil barrier caps over areas that are potential sources of groundwater contamination; (b) installation of engineered "gamma" soil barrier caps at areas containing slag fill and ore; (c) installation of a groundwater extraction and treatment system that will capture and contain all contaminated groundwater at the FMC Property fence line, and treat the extracted groundwater; and (d) long-term monitoring and maintenance.

ANSWER: Answering the allegations of paragraph 188, Defendant denies that EPA's Interim Remedy is intended to address and remediate contamination on the FMC Property only, and denies Plaintiff's inaccurate characterization of the Interim Remedy, which has not been implemented.

189. The combination of ET and gamma caps will protect future site workers, visitors, and trespassers from potential exposure to soils containing contaminants and prevent contaminants from migrating to groundwater.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 189, which concerns ET and gamma caps whose design has not yet received EPA approval, are not now in place, and therefore have not been tested, and Defendant therefore denies the allegations of paragraph 189.

190. The groundwater extraction and treatment system will further minimize the migration of arsenic and orthophosphates in groundwater from the FMC Plant Property to the Portneuf River.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 190, which concerns a groundwater extraction and treatment system whose design has not yet received EPA approval, which has not been implemented and therefore has not been tested, and therefore denies those allegations.

e. FMC Has Diligently Complied with EPA's Decisions Regarding Site Investigations and Remediation.

191. Throughout the last 25 years, FMC has diligently completed the CERCLA investigations and studies that EPA has required in an exhaustive manner, in compliance with CERCLA regulations and requirements, under strict EPA oversight, and with the active participation of the Tribes.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 191, and therefore denies those allegations.

192. The CERCLA remedial investigations and feasibility studies performed over the last 25 years (a) fully characterize the environmental condition of the FMC Property and surrounding areas, (b) assess the risks presented to human health and the environment, and (c) evaluate the remedial action alternatives that could be performed to minimize those risks.

ANSWER: Defendant denies the allegations of paragraph 192.

193. EPA's decisions are scientifically sound and factually reliable. EPA's decisions regarding the EMF Superfund Site and the FMC Property are based on EPA's environmental expertise and the best professional judgment of experts in EPA Region 10, other experts from EPA regions in the United States, senior EPA Headquarters personnel, and other government agency personnel and contractual consultants with expertise and experience regarding the contaminants and affected environmental media at the FMC Property.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the first sentence of paragraph 193, which does not identify the EPA decisions to which it refers, and therefore denies that allegation. If the first sentence is intended to refer to EPA decisions that are reflected in the IRODA, Defendant denies the allegations of that sentence, as whether those decisions are "scientifically sound and factually reliable" cannot be assessed before those decisions have been implemented. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the second sentence of paragraph 193, which generally characterizes the identity, qualifications, and expertise of all decisionmakers involved in all EPA decisions regarding the EMF Superfund Site and the FMC Property, and therefore denies those allegations.

194. EPA's decisions regarding the remedial investigations, feasibility studies, removal actions and remedial actions at the EMF Superfund Site, including the FMC OU are, and will continue to be, protective of public health and environment of both the Tribal and surrounding communities.

ANSWER: Defendant denies the allegations of paragraph 194, which contends that EPA decisions that have not yet been implemented at the EMF Superfund Site are presently and will

continue to be protective of public health and the environment of Tribal and surrounding communities.

195. EPA's decision-making process under both RCRA and CERCLA, EPA's close cooperation with the Tribes, and EPA's inclusion of the general public in the CERCLA and RCRA decision-making processes ensures that the concerns of the Tribes and surrounding community residents are fully taken into account in the decisions made by EPA.

ANSWER: Defendant denies the allegations of paragraph 195.

f. EPA Has Ordered FMC to Perform the Interim Remedy, and FMC is Currently Engaged in Performing This Work.

196. In June 2013, EPA issued a Remedial Design/Remedial Action Unilateral Administrative Order ("RD/RA UAO") directing FMC to perform the Interim Remedy. FMC has agreed to comply with the RD/RA UAO and perform the Interim Remedy. As of November 2014, FMC has already completed a large part of the Remedial Design Phase, which is the first work required by the RD/RA UAO, and has commenced site grading.

ANSWER: Defendant admits the allegations of the first and second sentences of paragraph 196. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of the third sentence of paragraph 196, and therefore denies that allegation.

197. EPA is providing oversight of FMC's performance of the Interim Remedy. Also, as EPA has done in the past, it continues to consult with the Tribes regarding all material aspects of the Interim Remedy design, construction, and performance.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 197. Defendant denies the characterization of EPA's consultation with the Tribes that is alleged in the second sentence of paragraph 197.

198. EPA's continued monitoring and regulation of the FMC Property, in close coordination with the Tribes, will ensure that EPA's remedies will remain effective no matter what unexpected events may occur in the future.

ANSWER: Defendant denies the allegations of paragraph 198.

g. EPA's Regulatory Processes Ensure That Tribal Health and the Environment Are Protected Now and Into the Future.

199. The RCRA and CERCLA processes ensure that EPA will continue to monitor and assure the performance of the RCRA Pond closures, post-closures and removal actions and both the Interim Remedy and the final CERCLA remedial action. These regulatory processes provide additional assurance that nothing from the FMC Property will harm the Tribes or "imperil the subsistence" of the Tribal community.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the first sentence of paragraph 199 that the RCRA and CERCLA processes will ensure that EPA will assure the performance of the listed actions as those processes are not self-executing, and any impediments or resistance by FMC to performance of the listed action are now unknown, and Defendant therefore denies those allegations. Defendant denies the allegations of the second sentence of paragraph 199, and denies that those allegations will provide "additional assurance."

200. EPA's CERCLA remedies will require long-term monitoring to ensure that the remedies continue to perform as designed, that the action objectives are achieved, and that the remedies remain protective in the future.

ANSWER: Defendant admits the allegation of paragraph 200 that EPA's CERCLA remedies will require long-term monitoring, but denies that such term monitoring can ensure that

the remedies continue to perform as designed, that the action objectives are achieved, and that the remedies remain protective in the future.

201. CERCLA requires that EPA review the Interim Remedy and the final CERCLA remedial action every five years to be sure that the remedies remain protective. These Five-Year Reviews are required by statute and are conducted at all Superfund sites.

ANSWER: Defendant admits the allegations of paragraph 201 except the allegation that review every five years will ensure that the remedies remain protective, which is denied.

202. In the twenty-five year period since EPA began regulation of hazardous substances at the FMC Property, no event has occurred—whether anticipated or unanticipated—that has created actual harm to Tribal human health, or which would pose any imminent threat to Tribal human health.

ANSWER: Defendant denies the allegations of paragraph 202.

h. EPA Has Fulfilled the United States' Trust Responsibility to the Tribes.

203. Consistent with the United States' trust responsibility to the Tribes, the EPA and the DOJ have: (a) diligently enforced RCRA and CERCLA requirements applicable to the FMC Property; and (b) engaged in fair and extensive consultation with the Tribes to ensure that their concerns are fully considered. EPA and DOJ will continue to carry out these actions in fulfillment of the ongoing federal trust responsibility to the Tribes.

ANSWER: Answering the allegations of the first sentence of paragraph 203, Defendant denies that enforcement of RCRA and CERCLA by EPA and DOJ is necessarily consistent with the trust responsibility; Defendant denies that EPA and DOJ have diligently enforced RCRA and CERCLA at the FMC Property in all instances; Defendant admits that in some instances EPA and DOJ have engaged in consultation with the Tribes that has been fair, extensive and for the

purpose of fully considering the Tribes concerns, but denies that EPA and DOJ have done so in all instances. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the second sentence of paragraph 203, and therefore denies those allegations, and denies that the EPA and DOJ actions described in this paragraph fulfill the trust responsibility.

204. EPA has also fulfilled the United States' trust responsibility by working with the Tribes at every step during the RCRA and CERCLA processes to ensure that the Tribes' questions, comments, and concerns are known to EPA and the Tribes' interests are taken into account in EPA's decisions.

ANSWER: Answering the allegations of paragraph 204, Defendant denies that the EPA actions described in paragraph 204 fulfilled the trust responsibility; denies that EPA has also fulfilled the trust responsibility by the actions alleged in this paragraph; denies that EPA has "work[ed] with the Tribes at every step during the RCRA and CERCLA processes;" and denies that the work with the Tribes that EPA has done has "ensure[d] that the Tribes' questions, comments, and concerns are known to EPA and the Tribes' interests are taken into account in EPA's decisions."

205. EPA has fulfilled this trust responsibility to the Tribes by reviewing and approving reports related to remedial investigations, feasibility studies, and RCRA closure and post-closure actions. EPA has further fulfilled the United States' trust responsibility to the Tribes by issuing UAOs, a RCRA Consent Decree, and an Interim Remedy that are fully authorized by CERCLA and RCRA and that are protective of human health, including Tribal health.

ANSWER: Answering the allegations of the first sentence of paragraph 205, Defendant denies that EPA has fulfilled the trust responsibility, and denies that EPA has allegedly done so "by reviewing and approving reports related to remedial investigations, feasibility studies, and RCRA closure and post-closure actions." Answering the allegations of the second sentence of paragraph 205, Defendant denies that EPA has fulfilled the trust responsibility, and denies that EPA has allegedly further done so "by issuing UAOs, a RCRA Consent Decree, and an Interim Remedy that are fully authorized by CERCLA and RCRA and that are protective of human health, including Tribal health," and denies that EPA's actions "are protective of human health, including Tribal health."

206. For example, in response to the Tribes' concerns about capping soils contaminated with elemental phosphorus, EPA committed to conduct an independent study with the Tribes to explore unproven technologies that might be used to excavate and treat soils. EPA has agreed to perform this additional independent study in cooperation with the Tribes despite the fact that the studies of all such potential technologies performed by FMC, EPA, the U.S. Army Corps of Engineers and third-party experts determined that no treatment technology is currently available to safely and effectively excavate and treat the soils that contain elemental phosphorus. EPA's National Remedy Review Board further evaluated and endorsed this finding and remedy decision.

ANSWER: Answering the allegations of the first sentence of paragraph 206, Defendant denies that the allegations made in this sentence are an example of the fulfillment of the trust responsibility by EPA; Defendant admits that EPA has agreed to conduct an independent study with the Tribes, but denies that the purpose of the study is "to explore unproven technologies that might be used to excavate and treat soils." Answering the allegations of the second

sentence of paragraph 206, Defendant denies "that the studies of all such potential technologies performed by FMC, EPA, the U.S. Army Corps of Engineers and third-party experts determined that no treatment technology is currently available to safely and effectively excavate and treat the soils that contain elemental phosphorus." Answering the allegations of the third sentence of paragraph 206, Defendant denies that "EPA's National Remedy Review Board further evaluated and endorsed this finding and remedy decision."

207. EPA's decision to fund yet another independent evaluation of the potential for additional elemental phosphorus excavation and treatment studies show the deliberate process that EPA follows to ensure that it is making the correct environmental decisions to protect the human health and the environment.

ANSWER: Answering the allegations of paragraph 207, Defendant denies that the study to which this paragraph refers will provide "yet another independent evaluation of the potential for additional elemental phosphorus excavation and treatment studies," and denies the characterization of this study that is alleged in the remainder of paragraph 207.

i. Tribal Health is Further Protected By the Tribes' Right of Recourse to Challenge EPA Decisions in the Federal Courts.

208. The Tribes can obtain recourse from the federal courts if they believe EPA's decisions are not sufficiently protective of Tribal health. This further undermines the Tribes' contention that their subsistence is "imperiled" by conditions at the FMC Property.

ANSWER: Defendant admits the allegations in paragraph 208 that the Tribes have access to federal court in accordance with federal law, but denies that access to federal court necessarily means that they "can obtain recourse . . . if they believe EPA's decisions are not sufficiently protective of Tribal health."

209. The Tribes challenged the RCRA Consent Decree in the District Court and the Ninth Circuit. After considering the Tribes' objections to the RCRA Consent Decree, both courts upheld the Decree.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 209. Answering the allegations of the second sentence of paragraph 209, Defendant admits that this Court approved the RCRA Consent Decree, and that the Court of Appeals for the Ninth Circuit held that it was not an abuse of discretion for this Court to do so, but otherwise denies the allegations of the second sentence.

210. As with the RCRA Consent Decree, the final CERCLA remedial action that EPA selects for the FMC Property will be subject to review by the federal courts to ensure that EPA is meeting its responsibility to protect human health, including Tribal health, and the environment. The federal courts will also ensure that EPA has fulfilled the United States' trust responsibility to the Tribes.

ANSWER: Answering the allegations of the first sentence of paragraph 210, Defendant denies that the RCRA Consent Decree was "subject to review by the federal courts to ensure that EPA is meeting its responsibility to protect human health, including Tribal health, and the environment," which mischaracterizes the terms on which the RCRA Consent Decree was subject to review, which are set forth in the decisions referenced in paragraph 210; as EPA has not selected the final CERCLA remedial action for the FMC Property, and that selection is years away, Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation concerning the terms on which the final CERCLA remedial action will be subject to review by the federal courts, and therefore denies that allegation. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the second

sentence of paragraph 210, which makes no reference to any pending or future action of any kind, or to any issue of any kind, and therefore denies that allegation.

211. The federal courts will not approve a final CERCLA remedial action for the FMC Property that imperils the political integrity, the economic security or the health or welfare of the Tribes or leaves open any realistic possibility that the FMC Property as a whole will have "catastrophic consequences" to the Tribes.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in paragraph 211, in which Plaintiff purports to guarantee how the federal courts will decide an unknown challenge to an unknown final CERCLA remedial action on unknown facts and unknown issues, and therefore denies that allegation.

j. Tribal Jurisdiction Over the FMC Property Will Conflict With EPA's Regulation Under CERCLA and RCRA.

212. EPA is charged with protecting human health and the environment, and has exercised control over every environmental risk associated with the FMC Property. Nevertheless, the Tribes do not agree with the remedial action that EPA has selected.

ANSWER: Answering the allegations of the first sentence of paragraph 212, Defendant denies that EPA is generally charged with protecting human health and the environment, as EPA's responsibilities are set forth in statutes which define the nature and scope of its duties in specific terms, including the circumstances in which EPA has some measure of responsibility for protecting human health and the environment. Answering the allegations of the second sentence of paragraph 212, Defendant admits that the Tribes do not agree with some parts of the remedial action that EPA has selected, but deny that they disagree with all such action, and deny that the Tribes' disagreement exists despite the responsibility that EPA is alleged to have under the first sentence of this paragraph.

213. The Tribes are not allowed to prescribe the remediation measures the EPA should follow. This Court has explained that that "[a] principle *[sic]* flaw in the Tribes' opposition is that, although the United States' trust responsibilities are significant and important, they do not allow the Tribes to prescribe the environmental remediation measures the United States should pursue." (July 13, 1999 Order, CV-98-0406-E-BLW, at 2).

ANSWER: Defendant admits the allegations of the first sentence of paragraph 213. Defendant admits that the quotation in the second sentence appears in the case cited following that sentence, but denies that the quotation refers to this case, the IRODA (which had not been issued then), or the as-yet unknown final CERCLA remedial action.

214. Apparently, the Tribes and the Tribal Court of Appeals have the opposite view from the District Court and the Ninth Circuit, believing that the Tribes should be able to override EPA decisions. The Tribal Court of Appeals wrote: "We considered the evidence showing that the EPA has not always implemented the tribes' desired remedies; and a document wherein the EPA stated that the EPA does not have to do what the tribes ask. We wondered if this approach truly provided protection of the tribes' interests." (April 15, 2014 Decision, p. 15).

ANSWER: Defendant denies the allegations of the first sentence of paragraph 214. Answering the allegations of the second sentence of paragraph 214, Defendant admits that the April 15, 2014 Decision contains the quoted language, but denies that the quotation, which is extracted from the Tribal Court of Appeals' consideration of "the extent to which the EPA was willing to consult with the [Tribes]," *id.* at 15, accurately characterizes that decision.

215. The Tribal Court of Appeals substituted its judgment for that of EPA regarding the risks before and after implementation of the EPA's remedy. In doing so, it ignored the evidence that EPA's decisions are protective of Tribal health and the environment.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 215, and the restatement of those allegations in the second sentence of paragraph 215. Answering the remaining allegations of the second sentence of paragraph 215, Defendant denies that the Tribal Court of Appeals ignored the evidence allegedly showing that EPA's decisions are protective of Tribal health and the environment, and denies that EPA's decisions are protective of Tribal health and the environment.

216. The Tribal Court of Appeals also directly challenged EPA's authority by rejecting EPA's measurement approach, stating "EPA testing strategies were not sufficient to protect the health and welfare of tribal members." (April 15, 2014 Decision, p. 21).

ANSWER: Defendant denies the allegation made in paragraph 216 that the Tribal Court of Appeals "directly challenged EPA's authority by rejecting EPA's measurement approach" and denies that Plaintiff's selective quotation from the April 15, 2014 Decision supports that allegation, as it mischaracterizes the decision.

217. The Tribal Court of Appeals also overruled EPA's determination that phosphine at the ponds "pose[s] no risk to human health or roaming mammalian or avian species." (April 15, 2014 Decision, p. 21). The Court felt it knew better than the EPA, and found that phosphine did pose such a risk. (April 15, 2014 Decision, p. 26).

ANSWER: Answering the allegations of the first sentence of paragraph 217, Defendant denies that EPA determined that phosphine at the ponds poses no risk to human health or roving mammalian or avian species, denies that the Tribal Court of Appeals "overruled EPA's determination that phosphine at the ponds 'pose[s] no risk to human health or roaming mammalian or avian species,'" denies that the quoted language appears on page 21 of the April 15, 2014 Decision, and denies that the quotation purports to say that the Tribal Court of Appeals

was overruling EPA's determination that phosphine at the "pond[s] poses no risk to human health or roaming mammalian or avian species.'" Answering the allegations of the second sentence of paragraph 217, Defendant denies that the Tribal Court of Appeals "felt it knew better than EPA," admits that the Tribal Court of Appeals found that "phosphine poses such a risk," and denies that this finding is contrary to EPA's determination.

218. Likewise, the Court overruled EPA's determination that "if FMC complies with all the remedial requirements issued by the EPA, containment should be accomplished." (April 15, 2014 Decision, p. 18). Instead, the Tribal Court of Appeals found that "[t]he remedial actions of the EPA might in fact fail," and that this possibility of failure was sufficient to justify tribal jurisdiction. (April 15, 2014 Decision, p. 18).

ANSWER: Answering the allegations of the first sentence of paragraph 218, Defendant denies that EPA has made a final determination under CERCLA that "'if FMC complies with all the remedial requirements issued by the EPA, containment should be accomplished.' (April 15, 2014 Decision, p. 18)," and denies that the Tribal Court of Appeals overruled any such alleged determination(s), whether final or not. Defendant denies that the allegation of the second sentence of paragraph 218 accurately states the Tribal Court of Appeals' finding on whether compliance with all remedial requirements by FMC would contain the contamination. As shown by the full discussion of that issue in the April 15, 2014 Decision, the court instead found that such an outcome is uncertain because it speaks to future events which are unknown at present, and because EPA's remedial actions might fail or FMC might not comply with all EPA requirements (which has happened in the past), and on this basis determined that the court was not responsible for predicting the future, but was instead "to determine if there is a threat or impact in the here and now." *Id.* at 18. Defendant also denies the allegation in the second

sentence of paragraph 218 that the Tribal Court of Appeals held that the possibility of failure was itself sufficient to justify tribal jurisdiction.

219. The ruling of the Tribal Court of Appeals clearly upsets the balance explained in the 1999 District Court ruling, which provided the Tribes an extensive ability to participate in EPA decision making, but left a single government entity—the EPA—with the final say.

ANSWER: Defendant denies the allegations of paragraph 219.

220. If given jurisdiction over the FMC Property, the Tribes can seek to impose requirements on FMC that will conflict with the EPA requirements and create risks to the Tribal and surrounding communities in southeast Idaho.

ANSWER: Defendant denies the allegations of paragraph 220, as this case will determine only whether the Tribes have jurisdiction to require FMC to obtain a Tribal waste storage permit and pay the annual waste storage fee, and whether the Tribal Court Judgment must be recognized and enforced; Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in paragraph 220 to the extent that it refers to unknown jurisdiction "given" to the Tribes, and therefore denies any such allegation.

221. The Tribes opposed the RCRA Consent Decree, asserting that "FMC should be forced to remove hazardous wastes stored in waste ponds instead of merely capping those ponds." (July 13, 1999 Order, CV-98-0406-E-BLW, at 2). If the Tribes truly had the jurisdiction and authority stated by the Tribal Court of Appeals, the Tribes could have required FMC to excavate and treat the phosphorus-contaminated soils, even though EPA had decided that excavation and treatment was not necessary to protect human health and the environment, and even though EPA had decided that excavation and treatment of pyrophoric soils would present serious short-term human health risks to site workers and the community.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 221. Answering the allegations of the second sentence of paragraph 221, Defendant admits that the Tribes "truly ha[ve] the jurisdiction and authority stated by the Tribal Court of Appeals," but denies that the Tribes have sought to exercise Tribal jurisdiction to require FMC to excavate and treat phosphorus-contaminated soils; Defendant also denies that EPA has made a final determination under CERCLA whether excavation and treatment of phosphorus-contaminated soils is necessary to protect human health and the environment and whether such action would present short-term human health risks to site-workers and the community.

222. Like their position in 1999 regarding the RCRA Consent Decree, the Tribes now object to the Interim Remedy because it also includes capping and management in place—rather than excavation and treatment—of soils containing elemental phosphorus.

ANSWER: Defendant admits the allegation of paragraph 222 that it objects to the Interim Remedy for the reasons stated, but denies that this case concerns that objection.

223. The Tribes assert that EPA should require FMC to excavate and treat 100% of all soils containing elemental phosphorus.

ANSWER: Defendant admits the allegations of paragraph 223, but denies that the assertion recited in this paragraph is an issue in this case, denies that statement fully and accurately characterizes the Tribes' position on soil contamination, or the Tribes' objections to the Interim Remedy.

224. The Tribes have attempted to adopt Tribal soil cleanup regulations that, if enforced, would require excavation and treatment of 100% of the phosphorus-contaminated soils at the FMC OU. The Tribes argue that the EPA should require their soil cleanup standards as part of the FMC OU remedy.

ANSWER: Answering the allegations of the first sentence of paragraph 224, Defendant denies that the Tribes have attempted to adopt the soil cleanup regulations described here, as the Tribes have adopted those regulations. Defendant admits the remainder of the allegations of paragraph 224, but denies that those allegations are an issue in this case.

225. EPA conducted exhaustive studies and evaluations of potential treatment technologies. Based on this information, EPA rejected the Tribes' requested excavation and treatment remedy as unsafe, infeasible, and unwarranted. EPA also decided that there is no currently known technology to excavate and treat the elemental phosphorus-containing soils at the FMC OU without creating a high risk of exposing elemental phosphorus to ambient air, resulting in spontaneous combustion that involves the release of phosphorus gases.

ANSWER: Defendant denies that the allegations of paragraph 225 accurately characterize EPA's position on potential treatment technologies for phosphorus contaminated soils, and denies that the subject matter of those allegations is an issue in this case.

226. EPA's extensive studies showed that the Tribes' proposed excavation remedy would present dangerous risks to remediation workers, emergency responders, adjoining Simplot Plant workers and the surrounding communities during the entire 20- to 40-year period that EPA estimates it would take to complete such excavation and treatment.

ANSWER: Defendant denies the allegations of paragraph 226, which incompletely and inaccurately characterize EPA's studies of the excavation remedy for phosphorus contaminated soils, which EPA continues to investigate.

227. It is important that a single decision maker have the authority to make the decisions regarding the actions necessary at the FMC Property. Allowing the Tribes to override EPA's authority conflicts with EPA's CERCLA powers to implement remedial action decisions

without interference. It would also allow the Tribes to mandate an excavation remedy that EPA has determined would cause serious risks to the safety of on-site workers and the surrounding community.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 227. Answering the allegations of the second sentence of paragraph 227, Defendant denies that the exercise of Tribal jurisdiction that is at issue in this case conflicts with EPA's CERCLA powers to implement remedial action decision without interference, denies that the Tribes are now exercising jurisdiction that conflicts with EPA's CERCLA powers to implement remedial action decision without interference, and otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the second sentence of paragraph 227, and therefore denies those allegations. Defendant denies the allegation made in the third sentence of paragraph 227 that allowing the Tribes to override EPA's authority would allow the Tribes to mandate an excavation remedy that EPA has determined would cause serious risks to the safety of on-site workers and the surrounding community, as EPA has made no such final determination and the Tribes have not asserted authority to override a decision that has not been made.

228. EPA must continue to be the final arbiter of environmental protection for many reasons, including that: (a) EPA possesses more expertise and resources to make correct decisions to protect human health and the environment; (b) EPA is charged with protecting all communities—both the Tribal and non-Tribal communities in southeast Idaho; (c) EPA has demonstrated that it listens to the Tribes' concerns regarding the FMC Property; and (d) the Tribes have full recourse to challenge EPA's final CERCLA remedial action decision in the federal courts if the Tribes believe that EPA's decisions are deficient.

ANSWER: Answering the allegations of the first sentence of paragraph 228, Defendant denies that EPA is and/or must continue to be the final arbiter of environmental protection, and lacks knowledge or information sufficient to form a belief about the truth of the allegation made in subpart (a), which identifies no specific subject area, expertise, or resources, refers to no specific decision, and identifies no specific comparator, and therefore denies subpart (a); Defendant denies that EPA is specifically charged with protecting all communities, including Tribal and non-Tribal communities in southeast Idaho, under RCRA or CERCLA, and as no source of such a charge is identified here, Defendant otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegation made in subpart (b) and therefore denies it; Defendant denies that the allegations made in subpart (c) are correct in some instances in which EPA has consulted with the Tribes, but admits that those allegations are correct in other instances; Defendant admits that the Tribes may challenge EPA's final CERCLA remedial action decision in the federal courts if the Tribes believe that EPA's decisions are deficient, but denies that the Tribes have "full recourse" to do so.

5. The Assertion of Tribal Jurisdiction Conflicts With the Jurisdiction of Power County in This Open Area of the Reservation.

229. The opinion of the Tribal Court of Appeals is also in error because it contradicts the jurisdiction of Power County to regulate the use of the FMC Property, which is located within Power County and is subject to Power County zoning authority.

ANSWER: Answering the allegations of paragraph 229, Defendant denies that the opinion of the Tribal Court of Appeals is in error, denies that the opinion contradicts the jurisdiction of Power County to regulate the use of the FMC Property, admits that the FMC Property is located within Power County, and lacks knowledge or information sufficient to form

a belief about the truth of the allegation that the FMC Property is subject to Power County zoning authority, and therefore denies that allegation.

230. The case of *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, supra* analyzed local and tribal zoning authority in two areas of an Indian reservation, one area that was "closed" and another area that was "open" and developed.

ANSWER: Defendant admits that the several opinions in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), discuss the subjects referred to in paragraph 230, but denies the characterization of the case that is alleged in paragraph 230.

231. The "open" area was open for public entry and access, near the public airport, governed by the local county, and near areas populated by non-Tribal members. *Brendale* held that the Yakima Indian Nation did not have jurisdiction to control activities in this area. Instead, the local county had the jurisdiction to control activities in this area.

ANSWER: Paragraph 231 characterizes the holding of the *Brendale* case, to which no response is required, but to the extent a response is required, Defendant denies Plaintiff's characterization of the facts and law in the *Brendale* decision.

232. On the other hand, the U.S. Supreme Court in *Brendale* allowed tribal jurisdiction to restrict commercial development within a "closed" area, where there had been no development of the property. This area was closed to the general public in order to protect the area's grazing, forest, and wildlife resources. *Brendale,* 492 U.S. at 438. Tribal police and game wardens maintained guard stations and patrolled the interior to prevent ingress to or egress from the highly restricted land. *Brendale,* 492 U.S. at 439. The area had no permanent inhabitants. *Brendale,* 492 U.S. at 438. The area was "an undeveloped refuge of cultural and religious

significance, a place where tribal members 'may camp, hunt, fish, and gather roots and berries in the tradition of their culture.'" *Brendale,* 492 U.S. at 441.

ANSWER: Paragraph 232 alleges conclusions of law to which no response is required, but to the extent a response is required, Defendant denies Plaintiff's characterization of the facts and law in the *Brendale* decision.

233. Following *Brendale,* the Ninth Circuit has held that the area near the FMC Property is not a "closed" area of the Fort Hall Reservation, within the meaning of that term as used in *Brendale.* In *Evans v. Shoshone Bannock Land Use Policy Commission,* the Ninth Circuit ruled that the area of the Evans' property, which is less than three aerial miles from the FMC Property, "bears no resemblance to the closed portion of the reservation in *Brendale." Evans,* 736 F.3d at 1304. The Ninth Circuit held that the area of this property was "dramatically different" than the closed area in *Brendale,* and that this area "does not in any way resemble the 'undeveloped refuge' in which the *Brendale* court permitted tribal zoning of non-Indian fee land." *Evans,* 736 F.3d at 1304-1305.

ANSWER: Paragraph 233 alleges conclusions of law to which no response is required, but to the extent a response is required, Defendant denies Plaintiff's characterization of the facts and law in *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013). The *Evans* case considered whether Evans, the landowner, was required to exhaust Tribal remedies before challenging Tribal jurisdiction to regulate the construction of a single-family home in a residential area; FMC was not a party to the case, and it did not involve the FMC Property, or the contamination that is stored on that property.

234. The Tribal Court of Appeals disregarded this Ninth Circuit law to hold that tribal jurisdiction existed over FMC by comparing the area of the FMC Property to the closed area in *Brendale*.

ANSWER: Answering the allegations of paragraph 234, Defendant denies that the Tribal Court of Appeals disregarded the *Evans* decision (which was considered at length by the Tribal Court of Appeals) or disregarded any other Ninth Circuit law, admits that the Tribal Court of Appeals held that Tribal jurisdiction existed over FMC for purposes of enforcing the Tribes' waste permit requirement, and that in so doing the court compared the Portneuf River and its importance to Tribal cultural activities to the closed area in *Brendale,* but otherwise denies the allegations of paragraph 234.

a. The FMC Property is Located in an "Open Area" of the Fort Hall Reservation and Services and Are Provided By Non-Indian Governmental and Private Entities.

235. Under the Indian General Allotment Act and other federal laws, significant portions of the Fort Hall Reservation, including the land that comprises the FMC Property, were allotted to individual members of the Tribes. The Indian Reorganization Act of 1934 ended the allotment of additional lands within the Fort Hall Reservation, but it did not restore to the Tribes the lands that had already been conveyed to non-Indians.

ANSWER: Answering the allegations of the first sentence of paragraph 235, Defendant denies that the Reservation was allotted under the Indian General Allotment Act, but admits that certain lands were allotted to Tribal members under the Act of Feb. 3, 1889, ch. 203, 25 Stat. 687, which ratified an 1880 Agreement between the United States and the Tribes, and that those lands included the lands which now comprise the FMC Property, but otherwise denies the allegations of the first sentence of paragraph 235. The allegation of the second sentence of paragraph 254 alleges conclusions of law to which no response is required, but to the extent a

response is required, Defendant admits that the IRA stopped the allotment process on all Indian lands, and admits that the IRA did not restore lands to the Tribes.

236. The FMC Property and the surrounding lands are predominantly owned in fee and populated by non-Tribal members who have no voice in Tribal governance. The Tribes do not have the power to exclude non-members from using the FMC Property and the surrounding lands. As a result, the FMC Property and surrounding lands are an "open area" of the Fort Hall Reservation that has lost its character as an exclusive Tribal resource. As a practical matter it has become an integrated portion of Power County that is not economically or culturally delimited by the Reservation boundaries. *See Brendale, supra* at 408-412.

ANSWER: Answering the allegations of the first sentence of paragraph 236, Defendant admits that the FMC Property is owned in fee, lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the first sentence that the FMC Property and the surrounding lands are populated, and therefore denies that allegation; Defendant denies that non-Tribal members have no voice in Tribal governance. The allegations of the second sentence of paragraph 236 purport to state a legal conclusion to which no response is required, but to the extent a response is required, denied. Defendant denies the allegations of the third and fourth sentences of paragraph 236.

237. The Cities of Pocatello and Chubbuck provide all domestic water service in the vicinity of the FMC Property, or such service is provided by privately-owned groundwater wells. The State of Idaho Department of Water Resources regulates and permits these groundwater wells.

ANSWER: Defendant denies that the Cities of Pocatello and Chubbuck provide domestic water service in the vicinity of the FMC Property, and otherwise lacks knowledge or

information sufficient to form a belief about the truth of the allegations made in paragraph 237, and therefore denies those allegations.

238. The City of Pocatello's wastewater treatment facility receives waste water from the FMC Property. No sewage disposal services in the vicinity have been built or maintained by the Tribes.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 238 that the City of Pocatello's wastewater treatment facility receives waste water from the FMC Property, and therefore denies those allegations. Defendant admits the second sentence of paragraph 238.

239. Idaho Power and Utah Power provide all electrical service to the FMC Property. The Tribes do not own or maintain any electrical generation or transmission facilities near the FMC Property.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation made in the first sentence of paragraph 239 that Idaho Power and Utah Power provide electrical service to the FMC Property, and therefore denies that allegation. Answering the allegations of the second sentence of paragraph 239, Defendant admits that Idaho Power and Utah Power provide electrical service on the Reservation, which is done by these entities on rights-of-way granted by the Tribes; Defendant admits that the Tribes do not otherwise own or maintain any electrical generation or transmission facilities near the FMC Property.

240. Intermountain Gas Company and Northwest Pipeline provide the natural gas infrastructure in the vicinity of the FMC Property. The Tribes have not built or maintained any natural gas services in the vicinity of the FMC Property.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in the first sentence of paragraph 240, and therefore denies those allegations. Answering the allegations of the second sentence of paragraph 240, Defendant admits that Intermountain Gas Company and Northwest Pipeline provide natural gas service on the Reservation, which is done by these entities on rights-of-way granted by the Tribes; Defendant admits that the Tribes do not otherwise own or maintain any natural gas services in the vicinity of the FMC Property.

241. Petroleum delivery occurs in the vicinity of the FMC Property via pipeline owned by Chevron and by mobile equipment. The Tribes have not built or maintained any petroleum delivery services in the vicinity of the FMC Property.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 241. Answering the allegations of the second sentence of paragraph 241, Defendant states that Chevron delivers petroleum on the Reservation and in the vicinity of the FMC Property via a pipeline that is located on a right-of-way granted by the Tribes; Defendant admits that the Tribes have not otherwise built or maintained any own or maintain any petroleum delivery services in the vicinity of the FMC Property.

242. Qwest Telecommunications provides telephone and cable services to the FMC Property. The Tribes do not provide any telephone or cable services in the vicinity of the FMC Property.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in the first sentence of paragraph 242, and therefore denies those allegations. Answering the allegations of the second sentence of paragraph 242, Defendant states that Qwest Telecommunications provides telephone and cable services to the Reservation

and in the vicinity of the FMC Property via a right-of-way granted by the Tribes; Defendant admits that the Tribes do not otherwise provide any telephone or cable services in the vicinity of the FMC Property.

243. Nearly all of the roads in the area of the FMC Property are constructed and maintained by the Idaho Transportation Department, Power County, and Bannock County. Only one road in the general area, identified as West Syphon Road and located approximately five miles north of the FMC Property, is maintained by the Tribes.

ANSWER: Defendant denies the allegations of paragraph 243.

244. The Union Pacific Railroad provides railroad transportation adjacent to the FMC Property. The Tribes do not provide any railroad services near the FMC Property.

ANSWER: Answering the allegations of the first sentence of paragraph 244, Defendant admits that the Union Pacific Railroad provides railroad transportation adjacent to the FMC Property. Answering the allegations of the second sentence of paragraph 244, Defendant states that Union Pacific provides railroad transportation on a right-of-way granted by the Tribes, but admits that the Tribes do not otherwise provide any railroad services near the FMC Property.

245. Chubbuck, Pocatello, and the Power County Sheriff's Office provide emergency services, such as fire, medical and police protection.

ANSWER: Answering the allegations of paragraph 245, Defendant admits that Chubbuck, Pocatello, and the Power County Sheriff's Office provide emergency services, such as fire, medical and police protection, as do the Tribes.

246. Based on Census Bureau data, the area immediately surrounding the FMC Property is sparsely populated, and the great majority of the total population surrounding the FMC Property is non-Indian.

ANSWER: Answering the allegations of paragraph 246, Defendant denies that the Census Bureau data referred to in this paragraph is comprehensive or correct, as that data is gathered only for residences with mailing addresses and its collection may or may not have included a ground follow-up; Defendant admits that Census Bureau data shows that the area bordering the FMC Property is sparsely populated, if "populated" refers to residences with mailing addresses, but if the term "immediately surrounding" as used in the first part of paragraph 246 is intended to include lands that do not border the FMC Property, Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation as this paragraph does not identify those other lands; Defendant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of paragraph 246, and therefore denies those allegations.

247. Based on these facts, the Ninth Circuit was clearly correct in holding that the area around the FMC Property "does not in any way resemble the 'undeveloped refuge' in which the *Brendale* Court permitted tribal zoning of non-Indian fee land." *Evans,* 736 F.3d at 1305. Conversely, the Tribal Court of Appeals was clearly wrong in rejecting the Ninth Circuit precedent, and holding exactly the opposite.

ANSWER: Answering the allegations of the first sentence of paragraph 247, Defendant denies that the Ninth Circuit considered all of the facts alleged in the paragraphs of Plaintiff's complaint preceding paragraph 247, denies that the Ninth Circuit considered the April 15, 2014 Decision and May 16, 2014 Findings and Conclusions, and denies that the holding of the Ninth Circuit in *Evans* was based on the allegations of Plaintiff's complaint in this case, or the findings of fact made by the Tribal Court of Appeals in the April 15, 2014 Decision and May 16, 2014 Findings and Conclusions; Defendant admits that the *Evans* decision contains the language

quoted in the first sentence of paragraph 247, but denies that holding applies to this case, in which the issue is whether the Tribes have jurisdiction to require FMC to obtain a Tribal waste storage permit and pay the annual permit fee, and whether the Tribal Court of Appeals Judgment should be recognized and enforced by this Court. Answering the allegations of the second sentence of paragraph 247, Defendant denies that the Tribal Court of Appeals was clearly wrong or wrong, denies that the Tribal Court of Appeals rejected Ninth Circuit precedent, and denies that the Tribal Court of Appeals held exactly the opposite of that precedent.

b. Power County Regulates and Seeks to Utilize the FMC Property.

248. Since 1947, Power County has exercised jurisdiction over the FMC Property and has provided zoning, public safety, land use, and other governmental services to the FMC Property and the surrounding properties. This is consistent with Power County's exercise of jurisdiction over all lands within the County, including all fee property within the Fort Hall Reservation that is owned by non-Indians.

ANSWER: Paragraph 248 asserts legal conclusions to which no response is required, but to the extent a response is required, Defendant denies that any jurisdiction exercised by Power County has been exclusive of federal and Tribal jurisdiction over the FMC Property and surrounding properties, denies that Power County exercises jurisdiction over all lands within the County, and otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 248, and therefore denies those allegations.

249. FMC's goal is to complete the Interim Remedy and the final CERCLA remedial action so that major portions of the FMC Property can be redeveloped for commercial and industrial uses that will provide employment, tax revenues, and other benefits to residents of the surrounding communities, including the Tribal community.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 249, and therefore denies those allegations.

250. The Cities of Pocatello and Chubbuck, and Power County share FMC's goal to make the FMC Property suitable for redevelopment. Power County will maintain the zoning classification of the FMC Property as "heavy industrial" for the FMC Property in order to preserve the property for industrial uses that will provide the greatest benefit to citizens of the County, including Tribal members who reside or work in Power County.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 250, and therefore denies those allegations.

251. Effective redevelopment of the FMC Property requires a single governing body to make zoning and land use decisions regarding its future use. Redevelopment of the FMC Property cannot proceed if there are two governing bodies claiming conflicting jurisdiction to make decisions regarding future use and redevelopment.

ANSWER: Defendant denies the allegations of paragraph 251.

252. Because the FMC Property is located in an "open area" of the Fort Hall Reservation and because planning and development decisions regarding the FMC Property will have a significant impact on the local communities, Power County—not the Tribes—should have the authority to make planning and development decisions for the FMC Property.

ANSWER: Answering the allegations of paragraph 252, Defendant denies the allegation that the FMC Property is in an "open area" of the Reservation; Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation that planning and development decisions regarding the FMC Property will have a significant impact on the local communities because neither the planning and development decisions referenced here, nor the

impact of those decisions on local communities, are now known, and therefore denies that allegation; Defendant denies that "Power County—not the Tribes—should have the authority to make planning and development decisions for the FMC Property," which is not an issue in this case in any event.

C. The Judgment Issued by the Tribal Court of Appeals Cannot Be Recognized or Enforced by the Court, Because FMC Was Not Afforded Due Process of Law and For Other Reasons.

253. The LUPC and the Tribes have encouraged FMC to file this Complaint as soon as possible so that the Tribes' jurisdiction can be decided. Further, the Tribes have notified FMC that they intend to imminently take action to enforce the Judgment.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 253; Defendant denies the allegations of the second sentence of paragraph 253.

254. Federal courts shall not recognize or enforce tribal court judgments if: (a) the tribal court did not have both personal and subject matter jurisdiction; or (b) the defendant was not afforded due process of law. *Wilson v. Marchington,* 127 F.2d 805, 810 (9th Cir. 1997).

ANSWER: Paragraph 254 alleges a bare conclusion of law to which no response is required, but to the extent a response is required, Defendant admits that *Wilson v. Marchington*, 127 F.2d 805, 810 (9th Cir. 1997), sets forth the principles of comity to be applied to determine whether a tribal court judgment should be recognized and enforced by a federal court, and denies that paragraph 254 fully and accurately characterizes those principles. As applied to the facts of this case, those principles compel recognition of the Tribal Court Judgment.

255. A federal court may decline to recognize and enforce a tribal court judgment on equitable grounds, including if: (a) the judgment was obtained by fraud; (b) the judgment conflicts with another final judgment that is entitled to recognition; (c) the judgment is inconsistent with the parties' contractual choice of forum; or (d) recognition of the judgment

or the cause of action upon which it is based is against the public policy of the United States or of the forum state in which recognition of the judgment is sought. *Wilson,* 127 F.3d at 810.

ANSWER: Paragraph 255 alleges a bare conclusion of law, to which no response is required, but to the extent a response is required, Defendant admits that the *Wilson* decision sets forth the principles of comity to be applied to determine whether a tribal court judgment should be recognized and enforced by a federal court, and denies that paragraph 255 fully and accurately characterizes those principles. As applied to the facts of this case, those principles compel recognition of the Tribal Court Judgment.

1. The Judgment Cannot Be Enforced Because the Tribes Lacked Subject Matter Jurisdiction Over FMC.

256. For the reasons explained in Sections IV.A and IV.B of this Complaint, the Judgment cannot be enforced because the Tribal Court of Appeals did not have jurisdiction over FMC under either exception established in *Montana.*

ANSWER: Defendant denies the allegations of paragraph 256 for the reasons set forth in Defendant's answer to the allegations set forth in the paragraphs of Sections IV.A and IV.B of this Complaint.

2. The Judgment Cannot Be Enforced Because the Tribal Procedure Did Not Provide Due Process.

257. Judgments that arise from tribal court proceedings which do not afford the defendant the basic tenets of due process will not be recognized by the United States. *Wilson,* 127 F.3d at 811. The guarantees of due process are vital to the United States system of democracy, and federal courts must ensure that the tribal court judgment has afforded the defendant due process of law. *Id.*

ANSWER: Paragraph 257 alleges bare conclusions of law, to which no response is required, but to the extent a response is required, Defendant admits that the *Wilson* decision sets

forth the principles of comity to be applied to determine whether a tribal court judgment should be recognized and enforced by a federal court, and denies that paragraph 257 fully and accurately characterizes those principles, including due process of law. As applied to the facts of this case, those principles compel recognition of the Tribal Court Judgment.

258. Due process requires an impartial tribunal that conducts a full and fair trial, with no showing of prejudice in the tribal court or in the system of governing laws. *Wilson,* 127 F.3d at 811. Evidence that the judiciary was dominated by the political branches of government or by an opposing litigant supports a conclusion that the legal system is one whose judgments are not entitled to recognition. *Id.*

ANSWER: Paragraph 258 alleges a bare conclusion of law, to which no response is required, but to the extent a response is required, Defendant admits that the *Wilson* decision sets forth the principles of comity to be applied to determine whether a tribal court judgment should be recognized and enforced by a federal court, and denies that paragraph 258 fully and accurately characterizes those principles. As applied to the facts of this case, those principles compel recognition of the Tribal Court Judgment.

259. Throughout this litigation, the Business Council has been the real party in interest as the entity that will receives the funds ordered in the Judgment. This is an action between FMC Corporation, on one side, and the Business Council and the LUPC, on the other side. The Tribal Court Judgment purports to order FMC to pay over $20 million and an annual $1.5 million fee to the Business Council and the LUPC.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 259. By its own action, FMC made the Business Council a party to the litigation in the Tribal Court by naming the Business Council as a defendant in the action, possibly because FMC was appealing

the Business Council's decision, though Defendant does not have information about FMC's reasons for doing so. Defendant denies that FMC's choice to name the Business Council as a party to the litigation in Tribal Court provides a basis for FMC's contention here that the Business Council was a real party in interest in the litigation. Under the LUPO Guidelines, annual permit fee payments are dedicated to the Hazardous Waste Management Program, LUPO Guidelines, ch. V, §§ V-9-1(C), V-9-1(E), V-9-2(B). Defendant denies the allegations of the second sentence of paragraph 259. Neither the Business Council nor the LUPC are named Defendants in this action, and Defendant denies this allegation for the same reasons stated in answering the allegations of the first sentence of paragraph 259. Defendant denies the allegations of the third sentence of paragraph 259, except the allegation that the Tribal Court Judgment orders FMC to pay over $20 million and an annual $1.5 million fee, which Defendant admits, though that judgment is to be paid to the Appellants-Counterclaimants in the action, which are the Tribes, the Business Council, and the LUPC.

a. The Business Council Dominates the Judicial System of the Tribes.

260. It is apparent from the Tribal Constitution that the Business Council has full and complete control over the LUPC and the Tribal courts. While other tribes have similar unicameral governments, in this case the Business Council acted not only as FMC's opposing party, but also as the authority over the decision makers. The Business Council exercised this authority to deny FMC the full, fair, and impartial proceedings in the Tribal system to which FMC is entitled, and to ensure that the final result in the Tribal proceedings would be a judgment finding that the Tribes have jurisdiction over FMC under the first and second *Montana* exceptions and requiring FMC to pay the Tribes a permit fee of $1.5 million for every year from 2002 and thereafter in perpetuity.

ANSWER: The first sentence of paragraph 260 alleges a conclusion of law to which no response is required, but to the extent a response is required, Defendant denies the allegation. Answering the allegations of the second sentence of paragraph 260, Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegation that other tribes have similar unicameral governments, and therefore denies that allegation; Defendant denies that the Business Council was "the authority over the decision makers" in this case. Answering the allegations of the third sentence of paragraph 260, Defendant denies that "[t]he Business Council exercised th[e] authority" it is (wrongly) alleged to hold in this paragraph "to deny FMC the full, fair, and impartial proceedings in the Tribal system to which FMC is entitled," and/or "to ensure that the final result in the Tribal proceedings would be a judgment finding that the Tribes have jurisdiction over FMC under the first and second *Montana* exceptions and requiring FMC to pay the Tribes a permit fee of $1.5 million for every year from 2002 and thereafter in perpetuity," denies that the Business Council has such authority, and otherwise denies that the Business Council has taken the actions alleged in this paragraph.

261. The Tribal Constitution establishes that "[t]he governing body of the Shoshone-Bannock Tribes of the Fort Hall Reservation shall be a council known as the Fort Hall business council." Art. III, § 1. The Tribal Constitution also provides that the Business Council has the power "[t]o promulgate and enforce ordinances." Art. VI, § 1(k).

ANSWER: Paragraph 261 alleges conclusions of law to which no response is required, but to the extent a response is required Defendant admits that the Tribal Constitution contains the language quoted in this paragraph, but asserts that language must be read in the context of the articles in which those provisions appear, the Tribal Constitution as a whole, and applicable Tribal law.

262. In addition to this role of enacting ordinances and laws, the Business Council is also given the power of establishing and supervising the Tribal courts. Article VI, § 1(k) of the Tribal Constitution gives the Business Council the power to provide "for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers." Art. VI, § 1(k).

ANSWER: The first sentence of paragraph 262 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant admits that under the Tribal Constitution the Business Council has the power to "establish[] a reservation court and defin[e] its duties and powers," *id*., art. VI, § 1(k), which must be read in the context of the article in which that provision appears, the Tribal Constitution as a whole, and applicable Tribal law. The second sentence of paragraph 262 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant admits that the Tribal Constitution contains the language quoted in this sentence, but asserts that language must be read in the context of the article in which it appears, the Tribal Constitution as a whole, and applicable Tribal law.

263. Outside of the Business Council, there are no other governing bodies provided for in the Tribal Constitution.

ANSWER: Paragraph 263 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies the allegations of paragraph 263.

264. There is no separation of powers in the Tribes' government. There is no independent judicial system, or independent legislative body, or independent executive. Instead, all governing power is held by the Business Council, which has the complete authority over the Tribes and their government and business affairs.

ANSWER: Paragraph 264 alleges conclusions of law to which no response is required, but to the extent a response is required Defendant denies the allegations of paragraph 264.

265. The subordination of all departments and groups to the Business Council is made clear by Article VI, § 1(s), which allows the Business Council to delegate some of its powers to "subordinate boards, committees, or cooperative associations" but only with the express reservation for the Business Council of "the right to review any action taken by virtue of such delegated power." Tribal Constitution, Art. VI, § 1(s). Not only are all departments and groups of the Shoshone-Bannock Tribes "subordinate" to the Business Council, but the Business Council is given the right in the Constitution to review any action taken by any of these groups.

ANSWER: The first sentence of paragraph 265 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies that "the subordination of all departments and groups to the Business Council is made clear by Article VI, § 1(s)," and admits that Article VI, § 1(s) of the Tribal Constitution contains the language that Plaintiff selectively quotes in this sentence, but denies that quotation properly interprets article VI, §1(s) of the Tribal Constitution. The second sentence of paragraph 265 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies that "all departments and groups of the Shoshone-Bannock Tribes [are] 'subordinate' to the Business Council," and denies that "the Business Council is given the right in the Constitution to review any action taken by any of these groups."

266. In this action, the Business Council was the party opposed to FMC, the party who sought money from FMC, and was also the party with complete and final authority over the court

system that determined whether to issue a judgment ordering FMC to pay money to the Business Council.

ANSWER: Answering the allegations of paragraph 266, Defendant admits that FMC appealed decisions of the LUPC to the Business Council, as provided for under the Ordinance, admits that the Business Council was named as a defendant in FMC's Tribal Court complaints, and admits that the Business Council was an opposing party in those actions for that reason. In further answer to the allegations of paragraph 266, Defendant denies that the Business Council "sought money from FMC," as this case instead concerns FMC's obligation to obtain a Tribal waste storage permit and pay the annual permit fee, and under the LUPO Guidelines that fee is dedicated to the Hazardous Waste Management Program, *id*. §§ V-9-1(C), V-9-1(E), V-9-2(B); Defendant also denies that the Business Council was "the party with complete and final authority over the court system that determined whether to issue a judgment ordering FMC to pay money to the Business Council," and denies that the Tribal Court Judgment orders FMC to pay money to the Business Council, rather than to the Appellants and Counterclaimants before the Tribal Court of Appeals.

267. The Tribal courts have not acted as an impartial tribunal. Instead, the Tribal courts were dominated by the political branch of the Tribal government and by the opposing litigant, and acted to issue the decision that was pre-determined by the Business Council. This is not a legal system whose judgment is entitled to recognition.

ANSWER: Defendant denies the allegations of the first and second sentences of paragraph 267. The third sentence of paragraph 267 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies the allegations of the third sentence of paragraph 267.

b. The History of this Litigation Demonstrates that the Fort Hall Business Council Controls the Tribal Courts.

268. The improper control of the Tribal courts by FMC's opposing litigant has been manifest from the beginning of this matter.

ANSWER: Defendant denies the allegation of paragraph 268 that FMC's opposing litigant has exercised improper control of the Tribal courts, and denies the allegation of paragraph 268 that the (wrongly) alleged improper control has been "manifest from the beginning of this matter."

i. Land Use Policy Commission

269. The District Court required FMC to submit Permit Applications to the LUPC. The LUPC issued Permit Decisions that found that the Tribes have jurisdiction over FMC and required FMC to pay millions of dollars in permit fees. (April 25, 2006 Findings of Fact and Decision of LUPC).

ANSWER: The first sentence of paragraph 269 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies the allegations of the first sentence because as shown by this Court's March 6, 2006 Memorandum Decision and Order, *United States v. FMC Corp*., No. CV-98-0406-E-BLW, 2006 WL 544505 (D. Idaho Mar. 6, 2006), and this Court's Memorandum Decision and Order of December 1, 2006 in the same case, 2006 WL 3487257, FMC agreed in the RCRA Consent Decree to apply for Tribal permits, and those orders recognized and enforced that obligation. Answering the allegations of the second sentence of paragraph 269, Defendant admits that LUPC issued Permit Decisions that found that the Tribes have jurisdiction to require FMC to obtain a Tribal waste storage permit and pay the annual permit fees, and that require FMC to do so, but denies the characterization of those decisions that is alleged in this sentence.

270. Under the Ordinance, the Business Council delegated certain of its powers to the LUPC, but the Business Council specifically "reserve[d] the right to review any action taken by virtue of such delegated power." (Ordinance § 4.A.1.b.). This reservation of the right to review all actions of the LUPC is required by Article VI, § 1(s) of the Tribal Constitution.

ANSWER: The first sentence of paragraph 270 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies that the Ordinance contained the quoted language at any time this matter was before the LUPC and the Business Council; Defendant admits that the language quoted in the first sentence is contained in the amended LUPO that became effective on February 2, 2010, but asserts that the cited portions of amended LUPO must be read in the context of the LUPO as a whole, the Tribal Constitution, and other applicable Tribal Law. The second sentence of paragraph 270 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies the allegations of the second sentence.

271. In addition, the budget of the LUPC is controlled by the Business Council (Ordinance, § 4.A.1.b.); and the Ordinance gives the Business Council the ability to remove any member of the LUPC, at any time that the Business Council finds that any member "has failed to fulfill his or her duties" under the Ordinance or other Tribal laws. (Ordinance, § 4.A.6). The Business Council has the ultimate power to pass another ordinance disbanding the LUPC at any time.

ANSWER: The first sentence of paragraph 271 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies that the Ordinance contained the cited provisions at any time this matter was before the LUPC and the Business Council; Defendant admits that the amended LUPO that became effective on February 2, 2010,

contains § 4.A.1.b but denies that the budget of the LUPC is controlled by the Business Council under that section; admits that the amended LUPO contains § 4.A.6., but denies the characterization of that provision that is alleged in this sentence, and asserts that the quoted language must be read in the context of the LUPO as a whole, the Tribal Constitution, and applicable Tribal law. The second sentence of paragraph 271 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant admits that the Business Council has legislative authority under the Tribal Constitution, which must be read in the context of the Tribal Constitution as a whole and applicable Tribal law, denies the characterization of that authority that appears in this sentence, and denies that the alleged authority has been exercised in the manner alleged here.

272. The LUPC is not provided for in the Tribal Constitution. As a result, the LUPC has no constitutionally-granted powers separate from the Business Council. Instead, it is only a body that the Business Council has delegated authority to in order to exercise a portion of the Business Council's powers under the Tribal Constitution. Such delegation is completely subject to the discretion and timing of the Business Council.

ANSWER: The first sentence of paragraph 272 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies the general allegation that the LUPC "is not provided for in the Tribal Constitution," but admits that the LUPC itself is not named in the Tribal Constitution. Defendant denies the characterization of the Ordinance, and/or the characterization of the amended LUPO, that is alleged in the second sentence of paragraph 272, and asserts that the Ordinance and any amendments to it must be read in the context of the Tribal Constitution and applicable Tribal law. The third and fourth sentences

of paragraph 272 purports to allege legal conclusions, to which no response is required, but to the extent a response is required, Defendant denies the allegations of those sentences.

ii. Business Council

273. Under the Ordinance, FMC was required to appeal the LUPC's decision to the Business Council. The Business Council, as the only body of authority of the Tribes, is the entity that would receive and dispose of any funds paid by FMC. Given this unalterable fact, the Business Council unsurprisingly found in its own favor, and promptly issued a decision affirming that the Tribes have jurisdiction over FMC and that FMC must pay the $1.5 million annual permit fees in 2001 and every year thereafter in perpetuity, which monies the Business Council could dispose of according to its unfettered discretion.

ANSWER: Answering the allegations of the first sentence of paragraph 273, Defendant denies that FMC was required to appeal the (unidentified) LUPC's decision to the Business Council under the Ordinance, but admits that FMC had the right to do so under the Ordinance and did so. Answering the allegations of the second sentence of paragraph 273, Defendant denies that the Business Council is "the only body of authority of the Tribes," and denies that as such it "is the entity that would receive and dispose of any funds paid by FMC," since annual permit fees are dedicated to LUPC costs related to the Hazardous Waste Management Program. LUPO Guidelines, §§ V-9-1(C), V-9-1(E), V-9-2(B). Answering the allegations of the third sentence of paragraph 273, Defendant denies that the allegations of the third sentence are an "unalterable fact;" Defendant denies that "the Business Council unsurprisingly found in its favor," and asserts that the Business Council affirmed the decisions of the LUPC for the reasons stated in the Business Council's decisions; Defendant denies that the decision of the Business Council required FMC to pay the $1.5 million annual permit fee in 2001, as FMC did so voluntarily that year, and denies that the decision of the Business Council requires FMC to pay the $1.5 million

annual permit fee every year thereafter "in perpetuity;" and Defendant denies that the annual permit fees are "monies the Business Council could dispose of according to its unfettered discretion."

iii. Tribal Court

274. FMC was required to appeal the decisions of the Business Council to the Shoshone-Bannock Tribal Court, another body subordinate to the Business Council.

ANSWER: Answering the allegations of paragraph 274, Defendant denies that FMC was required to appeal the decisions of the Business Council to the Tribal Court, but admits that FMC had the right to do so, and did so, denies that the Tribal Court is "another body subordinate to the Business Council," and denies that the Tribal Court is "subordinate to the Business Council."

275. The Business Council established the Tribal Court by ordinance. (Law & Order Code, Chapter 1, § 1). The Business Council established the Tribal Court pursuant to the Tribal Constitution, which gives the Business Council the power to "provid[e] for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers." Tribal Constitution Art. VI, § 1(k).

ANSWER: Defendant admits the allegations of the first sentence of paragraph 275, but denies that it accurately characterizes the establishment of the Tribal Courts, which were established by the Business Council pursuant to article VI, § 1(k) of the Tribal Constitution, as set forth in Chapter I, § 1 of the Law and Order Code. The Defendant admits that the language quoted in the second sentence of paragraph 275 appears in article VI, § 1(k) of the Tribal Constitution, but asserts that § 1(k) must be read in the context of article VI, the Tribal Constitution as a whole, and applicable Tribal law.

276. Upon information and belief, the Tribal Court has no independent means of funding its efforts. Instead, the budget of the Tribal Court is controlled by the Business Council.

ANSWER: Answering the allegations of paragraph 276, Defendant admits that the Business Council appropriates funds for the Tribal Court under article VI, § 1(g) of the Tribal Constitution, but denies that the Tribal Court has no other means of funding its operations and denies that the budget of the Tribal Court is controlled by the Business Council once funds have been appropriated for the Tribal Court.

277. Under the Tribal Constitution, the Business Council has the ultimate power at all times to define and revise the Tribal Court and the judicial system of the Tribes. In addition to this ultimate power, the Fort Hall Business Council has the power to appoint the judges of the Tribal Court. Section 3.2 of Chapter 1 of the Law and Order Code provides that "All judges of the Shoshone Bannock Tribal Court shall be appointed by the Fort Hall Business Council." (Law and Order Code, Ch. I, § 3.2).

ANSWER: The first sentence of paragraph 277 alleges a conclusion of law to which no response is required, but to the extent a response is required Defendant denies that "[u]nder the Tribal Constitution, the Business Council has the ultimate power at all times to define and revise" either "the Tribal Court," or "the judicial system of the Tribes," or both. The second sentence of paragraph 277 alleges a conclusion of law to which no response is required, but to the extent a response is required, Defendant denies that the allegations of the second sentence are "[i]n addition to th[e] ultimate power" (wrongly) alleged in the preceding sentence, admits that Chapter I, § 3.2 of the Law and Order Code addresses the appointment of judges by the Business Council, but asserts that § 3.2 must be read together with other relevant provisions of Chapter I, the Judicial Council Ordinance, the Tribal Constitution, and other applicable Tribal law. Answering the allegations of the third sentence of paragraph 277, Defendant admits that the quoted language appears in Chapter I, § 3.2 of

the Law and Order Code, but asserts that § 3.2 must be read together with other relevant provisions of Chapter I, the Judicial Council Ordinance, the Tribal Constitution, and other applicable Tribal law.

278. Every judge of the Tribal Court must swear in an oath of office to "cooperate and promote, and protect the best interests of the Shoshone Bannock Tribes." (Law and Order Code, Ch. I, § 3.2). The Business Council sets the rates upon which the tribal judges will be compensated. (Law and Order Code, Ch. I, § 3.7).

ANSWER: Answering the allegations of paragraph 278, Defendant denies that the oath of office for Tribal Court judges is set forth at Law and Order Code, Chapter I, § 3.2, and denies that the partial quotation that appears in paragraph 278 accurately recites the oath of office for Tribal Court judges, which is set forth in full at Chapter I, § 3.3 of the Law and Order Code. Defendant denies that the allegations of the second sentence of paragraph 278 accurately describe the process by which the compensation for Tribal Judges is determined, and denies that the Business Council sets the compensation rates.

279. The Business Council also has the power to suspend or remove Tribal Court judges. (Law and Order Code, Ch. I, § 3.8).

ANSWER: Paragraph 279 alleges a bare conclusion of law to which no response is required, but to the extent a response is required, Defendant denies that the power of the Business Council to suspend or remove Tribal Judges is exclusive, denies that paragraph 279 describes that process accurately and completely, and denies that it accurately recites the terms of Chapter I, § 3.8 of the Law and Order Code, which requires reasonable cause to suspend or remove a judge, and that a written statement of such cause be provided to the judge at least five days before the public hearing which must be held to hear the charges, at which the judge must be provided an opportunity to answer any and all charges, *id.*; in addition, § 3.8 must be read in

accordance with the Judicial Council Ordinance, the Tribal Constitution, and other applicable Tribal law.

280. Upon information and belief, the Business Council or its subordinates chose to have FMC's appeal heard by David Maguire, an attorney licensed by the State of Idaho with a legal practice in Pocatello, Idaho.

ANSWER: Defendant denies the Business Council chose Judge Maguire, but admits the allegation that he heard FMC's appeal and admits the remaining allegations of paragraph 280.

281. As explained above, after examining the evidence and the law, Judge Maguire ruled that FMC did not owe the $1.5 million annual permit fee to the Tribes because any understanding regarding the fees owed was not a contract.

ANSWER: Answering the allegations of paragraph 281, Defendant denies that paragraph 281 accurately describes Judge Maguire's ruling or the basis of that ruling, denies that Judge Maguire's ruling is accurately explained in the allegations of Plaintiff's complaint that precede paragraph 281, and denies the inaccurate characterization of Judge Maguire's May 21, 2008 ruling that appears in this paragraph.

282. Upon information and belief, this decision upset the Business Council or its subordinates. Upon information and belief, in response to this decision, the Business Council determined to no longer use David Maguire as a judge, and removed him from the office to which he had been appointed in 2009.

ANSWER: Answering the allegations of the first sentence of paragraph 282, the Business Council is a governmental body, and Defendant therefore denies the allegation that Judge Maguire's decision "upset the Business Council," but admits that it was not pleased with the decision; Defendant denies that "its subordinates" were "upset" to the extent that term refers

to governmental bodies for the same reason, and lacks knowledge or information sufficient to form a belief about the truth of the allegations that the Business Council's "subordinates" were upset if the term "subordinates" is intended to refer to individual persons, as no such persons are identified in the first sentence. Answering the allegations of the second sentence of paragraph 282, Defendant denies that the Business Council removed Judge Maguire from office and denies that the Business Council determined to no longer use Judge Maguire as a judge.

283. Upon information and belief, in response to this decision, the Business Council or its subordinates also communicated to David Maguire its displeasure with his decision, and unreasonably delayed payment for his time and efforts.

ANSWER: Answering the allegations of paragraph 283, Defendant denies that the Business Council or its subordinates communicated "displeasure" to Judge Maguire regarding his decision if the terms "Business Council" and "its subordinates" are intended to refer to governmental entities; Defendant otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations that the "Business Council" or "its subordinates" "communicated 'displeasure'" to Judge Maguire regarding his decision, and therefore denies this allegation; Defendant denies that Judge Maguire's payment for his time and efforts was delayed as a result of his decision, as Plaintiff impliedly alleges.

iv. Tribal Court of Appeals

284. In May 2008, the decision of Judge Maguire was appealed to the Tribal Court of Appeals. The case was then before the Tribal Court of Appeals for six years, during which time the lack of due process was further demonstrated.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 284. Answering the allegations of the second sentence of paragraph 284, Defendant denies that Judge Maguire's decision was before the Tribal Court of Appeals for six years, and denies that during

the time that the case was before the Tribal Court of Appeals, including the proceedings on the second *Montana* exception, or at any earlier time, there was any denial of due process by the Tribal Courts.

285. After the notice of appeal was filed in May 2008, FMC did not know who was on the Tribal Court of Appeals until October 2009, when the Tribal Court of Appeals provided notice of a conference which would be presided over by Fred Gabourie as Chief Judge, and Mary Pearson and Cathy Silak as Associate Judges.

ANSWER: Answering the allegations of paragraph 285, Defendant admits that the parties were informed of the names of the judges on the Tribal Court of Appeals panel that would hear the appeals in this matter in October 2009, when the Tribal Court of Appeals provided notice of a conference which would be presided over by Fred Gabourie as Chief Judge, and Mary Pearson and Cathy Silak as Associate Judges.

286. The case was briefed in 2010, and was under consideration by the Tribal Court of Appeals in 2010, and in 2011, and until May 2012, when the Tribal Court of Appeals issued its decision against FMC.

ANSWER: Answering the allegations of paragraph 286, Defendant admits that the appeal and cross-appeal of Judge Maguire's rulings were briefed in 2010, admits that the case was under consideration by the Tribal Court of Appeals in 2010 and 2011, admits that the Tribal Court of Appeals issued a decision in the case in May of 2012, *see* June 26, 2012 Amended Findings, denies the characterization of the decision alleged here, and denies that the May 2012 decision concluded the Tribal Court of Appeals' consideration of the case. *See* Order of May 28, 2013; April 15, 2014 Decision; May 16, 2014 Findings and Conclusions.

287. While the case was under consideration by this panel, two of the members of the panel (Judge Gabourie and Judge Pearson) made a presentation at a public seminar held at the University of Idaho on March 23, 2012. The seminar was entitled "Tribal Courts: Jurisdiction and Best Practices." The presentation by the Tribal Court of Appeals Judges Gabourie and Pearson was titled, "The Importance of Tribal Appellate Courts."

ANSWER: Answering the allegations of paragraph 287, Defendant admits that Judges Gabourie and Pearson made a presentation at a legal educational seminar held at the University of Idaho College of Law on March 23, 2012, that the seminar and presentation were titled as alleged, and denies the characterization of the Judges' presentation as occurring "[w]hile the case was under consideration," except to the extent that it refers to the date of the seminar in relation to the final disposition of the Tribal Court proceedings before the Court in this case.

288. The seminar was organized by Professor Angelique EagleWoman of the University of Idaho College of Law. The seminar was videotaped and attorneys and members of the public attended.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the first sentence of paragraph 288, and therefore denies those allegations. Defendant admits the allegation of the second sentence of paragraph 288 that the March 23, 2012 seminar was videotaped, but lacks knowledge or information sufficient to form a belief about the truth of the allegation that attorneys and members of the public attended the March 23 seminar, other than counsel for FMC, and therefore denies that allegation.

289. At this videotaped public seminar, Judges Gabourie and Pearson explained that it was important for Tribes to obtain as much jurisdiction and sovereignty as possible, and how tribal appellate judges could issue decisions to achieve this goal for tribes.

ANSWER: Answering the allegations of paragraph 289, Defendant denies the Plaintiff's characterization of the March 23, 2012 presentation made by Judges Gabourie and Pearson at the Idaho Law School as that characterization is incomplete, misleading, incorrect, and fails to acknowledge that FMC did not make any objection to that presentation until after the Tribal Court of Appeals had issued its May 2012 decision. *See* June 26, 2012 Amended Findings.

290. Judges Gabourie and Pearson publicly criticized many of the principal United States Supreme Court decisions regarding tribal jurisdiction. First and foremost, they criticized the Supreme Court's landmark decision in *Montana,* which they stated "has just been murderous to Indian tribes." Chief Judge Gabourie explained that tribal jurisdiction is being "narrowed down" in order "to fit within the slim scope" of *Montana.*

ANSWER: Answering paragraph 290 through 299, Defendant is without knowledge or information sufficient to determine the truth of allegations which purport to quote statements made by Judges Gabourie and Pearson at their March 23, 2012 seminar presentation, and therefore denies those allegations. In answering allegations concerning the March 23, 2012 seminar presentation in paragraph 290 through 299, Defendant is relying on the transcript of that presentation attached as Exhibit B to the affidavit of Maureen L. Mitchell that was filed in the Tribal Court of Appeals on May 6, 2013. *See* Declaration of Maureen L. Mitchell in Support of FMC Corporation's Pre-Hearing Brief Re Case Management, Ex. B ("Mitchell Decl."). Defendant incorporates the foregoing response in their answer to paragraphs 291 through 299. In further response to the allegations of paragraph 290, Defendant denies the Plaintiff's characterization of the March 23, 2012 presentation made by Judges Gabourie and Pearson at the Idaho Law School, as that characterization is incomplete, misleading, and incorrect, and fails to

acknowledge that FMC did not make any objection to that presentation until after the Tribal Court of Appeals had issued its May 2012 decision. *See* June 26, 2012 Amended Findings.

291. Chief Judge Gabourie explained that tribal appellate judges should help evade these Supreme Court precedents, stating "you better have a good appellate court decision to get around that *[Montana v. United States,* 450 U.S. 544 (1981)]."

ANSWER: In response to the allegations of paragraph 291, Defendant denies the Plaintiff's characterization of the March 23, 2012 presentation made by Judge Gabourie at the Idaho Law School, as that characterization is incomplete, misleading, and incorrect, and fails to acknowledge that FMC did not make any objection to that presentation until after the Tribal Court of Appeals had issued its May 2012 decision. *See* June 26, 2012 Amended Findings.

292. Judges Gabourie and Pearson also criticized *Nevada v. Hicks,* 533 U.S. 353 (2001), and *South Dakota v. Bourland,* 508 U.S. 679 (1993). Judge Gabourie said: "I think Judge Ginsburg made a mistake" in her opinion for the unanimous court in *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). The judges took the position that the United States Supreme Court decisions in *Bourland* and *Strate* were "bad decisions."

ANSWER: Answering the allegations of paragraph 292, Defendant denies the Plaintiff's characterization of the March 23, 2012 presentation made by Judges Gabourie and Pearson at the Idaho Law School, as that characterization is incomplete, misleading, and incorrect, and fails to acknowledge that FMC did not make any objection to that presentation until after the Tribal Court of Appeals had issued its May 2012 decision. *See* June 26, 2012 Amended Findings.

293. Judges Gabourie and Pearson explained that the way to avoid "bad decisions" was for the tribal appellate courts to advocate the tribe's position in the decision, so as to make a better record that would more likely be affirmed by the federal courts.

ANSWER: Answering the allegations of paragraph 293, Defendant denies the Plaintiff's characterization of the March 23, 2012 presentation made by Judges Gabourie and Pearson at the Idaho Law School, as that characterization is incomplete, misleading, and incorrect, and fails to acknowledge that FMC did not make any objection to that presentation until after the Tribal Court of Appeals had issued its May 2012 decision. *See* June 26, 2012 Amended Findings.

294. The short presentation made by Judges Gabourie and Pearson made it clear that they were not fair and impartial. Instead, it showed that they saw themselves only as advocates for the position of the tribes. Judge Gabourie told the audience that the tribal "appellate courts have got to step in" and "be sure to protect the tribe."

ANSWER: Answering the allegations of the first sentence of paragraph 294, Defendant denies that Judges Gabourie and Pearson were not fair and impartial, and denies that their presentation at the March 23, 2012 seminar indicates otherwise. Defendant denies the allegations of the second sentence of paragraph 294. Answering the allegations of the third sentence of paragraph 294, Defendant denies the Plaintiff's characterization of the March 23, 2012 presentation made by Judge Gabourie, as that characterization is incomplete, misleading, and incorrect, and fails to acknowledge that FMC did not make any objection to that presentation until after the Tribal Court of Appeals had issued its May 2012 decision. *See* June 26, 2012 Amended Findings.

295. Judges Gabourie and Pearson made specific comments about mining and manufacturing companies that appeared to clearly implicate the FMC site, even though they did not specify a particular litigant and had not heard any evidence in court regarding the investigation of the FMC site, the remediation efforts accomplished, or any chemicals present near the site. From their statements, Judges Gabourie and Pearson demonstrated that they had

made up their minds before any evidence was presented. Judge Gabourie was very forthright in saying that he knew the fact of pollution even with no proof:

> You know, there's one area, too, there are tribes that have had mining and other operations going on, on the reservation, you know, and then the mining company or whatever, manufacturing company, disappears. They leave, you know. They've — they've either dug everything they could, and the then ground is disturbed, sometimes polluted beyond repair.
>
> And you sit as a — as an appellate court justice, and you're starting to read the cases that come down from the tribal court. And you're saying to yourself, you know, We know that the — there's pollution, that the food that they're eating is polluted, the water's polluted, but nobody proved it. And while John Jones said that it is polluted, you know, John Jones don't count. But the tribal courts have got to realize that you need expert witnesses. You need chemists and whatever to get out of testifying. It may cost a little, but so the appellate court is in a position of remanding that case back and say "do it."

ANSWER: Defendant denies the allegations of the first sentence of paragraph 295, except the allegation that the quotation alleged in paragraph 295 "did not specify a particular litigant," which Defendant admits. Defendant denies the allegation of the second sentence of paragraph 295 that Judges Gabourie and Pearson made up their minds before any evidence was presented in, and denies that their presentation at the March 23, 2012 seminar demonstrated otherwise. Answering the allegations of the third sentence of paragraph 295, Defendant denies that the alleged quotation shows that Judge Gabourie "was very forthright in saying that he knew the fact of pollution even with no proof," and denies the characterization of Judge Gabourie's presentation that is alleged in this sentence and in the alleged quotation which is attached to it.

296. Judge Pearson also made it clear that she had made up her mind in the same way, judging that FMC had dirtied the groundwater and then gone out of business:

> Well, I encourage you to get the Bugenig handouts, because it's really important. If you're a law student and you're going to practice law, as well as if you're a judge and you're going

> to be hearing cases, you know where — companies come on the reservations and do business for X number of years and they dirty up your groundwater and your other things, and they they go out of business. And they leave you just sitting. And you need to know what you can do as you're sitting as a judge with those cases coming toward you.

ANSWER: Answering the allegations of paragraph 296, Defendant denies the allegation that Judge Pearson "had made up her mind in the same way," denies that Judge Pearson had "judg[ed] that FMC had dirtied the groundwater and then gone out of business," and denies that the alleged quotation that appears in this paragraph supports the allegation which precedes the quotation.

297. The pre-judgments made by Judges Gabourie and Pearson were wrong. FMC did not abandon its site or its responsibilities, but instead FMC has diligently pursued the environmental investigation and remediation efforts in full cooperation with the EPA. FMC has fully funded such efforts, including oversight costs incurred by EPA, the State of Idaho, and the Tribes, and has complied with EPA requirements for providing financial assurance for the investigations and remediation as well as corporate financial reporting requirements for setting aside amounts and reserves required to fund such efforts into the future.

ANSWER: Answering the allegations of the first sentence of paragraph 297, Defendant denies that Judges Gabourie and Pearson made pre-judgments, and accordingly no response is required for the remainder of the first sentence, but if a response is required, denied. Answering the allegations of the second sentence of paragraph 297, Defendant admits that FMC did not abandon the FMC site but lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of the second sentence of paragraph 297, which do not identify the specific responsibilities that FMC is alleged not to have abandoned and are otherwise too general to admit or deny, and Defendant therefore denies those allegations. Answering the

allegations of the third sentence of paragraph 297, Defendant denies that FMC has fully funded oversight cost incurred by the Tribes and otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in the third sentence of paragraph 297, and therefore denies those allegations.

298. Also, Judge Gabourie had erroneously pre-judged that food had been polluted, which is entirely untrue, as demonstrated at the subsequent evidentiary hearing when the Tribes could offer nothing but the testimony of "John Jones" *(i.e.,* a non-expert) that there was any such pollution. Similarly, Judge Pearson had erroneously pre-judged that groundwater was polluted, even though the evidence subsequently showed that there was no contamination of any groundwater wells used by any person outside of the FMC Property.

ANSWER: Answering the allegations of the first sentence of paragraph 298, Defendant denies that Judge Gabourie had "pre-judged that food had been polluted" by FMC's contamination, either "erroneously" or otherwise, and accordingly need not answer the allegation that this was entirely untrue, but if a response is required, denied; Defendant denies the allegation that "this was demonstrated at the subsequent evidentiary hearing when the Tribes could offer nothing but the testimony of 'John Jones' *(i.e.,* a non-expert) that there was any such pollution." Answering the allegations of the second sentence of paragraph 298, Defendant denies the allegation that Judge Pearson had "pre-judged that groundwater was polluted," by FMC's contamination, whether "erroneously" or otherwise, denies that Judge Pearson subsequently heard evidence that confirms the (wrongly) alleged pre-judgment, and denies the absolute and unqualified allegation that "the evidence subsequently showed that there was no contamination of any groundwater wells used by any person outside of the FMC Property."

299. Based on these statements, it was no surprise that the Tribal Court of Appeals issued its decision against FMC on May 8, 2012, as would be predicted based on the options expressed by Judges Gabourie and Pearson at the public seminar.

ANSWER: Answering the allegations of paragraph 299, Defendant denies the allegation that "it was no surprise that the Tribal Court of Appeals issued its decision against FMC on May 8, 2012," denies that the alleged lack of a surprise is shown by the allegations of FMC's complaint preceding this paragraph or by the Judges' presentation at the March 23, 2012 seminar, and denies that the May 8, 2012 Findings and Conclusions "would be predicted based on the options expressed by Judges Gabourie and Pearson at the public seminar."

300. On May 18, 2012, FMC made a request for the videotape taken of the seminar by the University of Idaho. However, even though the public was invited to the seminar, the University of Idaho denied the request on behalf of Professor EagleWoman.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 300, and therefore denies those allegations.

301. Given that the Tribes had reason to prevent distribution of the videotape, upon information and belief, it appears that the Tribes or the Tribal Appellate Judges sought to prevent disclosure of evidence of their statements.

ANSWER: Answering the allegations of paragraph 301, Defendant denies that the Tribes had reason to prevent distribution of the videotape, and denies that the Tribes sought to do so. Defendant otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 301, and therefore denies those allegations.

302. Because of the refusal to release the videotape of the public seminar, FMC filed an action under the Idaho Public Records Act against the University of Idaho on November 20, 2012, seeking the release of the videotape.

ANSWER: Answering the allegations of paragraph 302, Defendant admits the allegation that "FMC filed an action under the Idaho Public Records Act against the University of Idaho on November 20, 2012, seeking the release of the videotape" but lacks knowledge or information sufficient to form a belief about the truth of the allegations concerning why FMC did so and therefore denies those allegations.

303. On January 3, 2013, the Idaho District Court for the Second Judicial District issued an Order Compelling Production of Public Document, ordering the University of Idaho to release the videotapes. FMC received the videotapes on January 10, 2013.

ANSWER: Answering the allegations of paragraph 303, Defendant admits that on January 3, 2013, the Idaho District Court for the Second Judicial District issued an Order Compelling Production of Public Document, ordering the University of Idaho to release a videotape of the March 23, 2012 seminar, but otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations made in paragraph 303, and therefore denies those allegations.

304. In the Opinion and Order issued by the Tribal Court of Appeals on May 8, 2012, the Tribal Court of Appeals remanded the matter to the Tribal Court to consider evidence relating to the second *Montana* exception. However, on January 14, 2013, shortly after the videotapes were released, the Tribal Court of Appeals revoked the remand of the matter to the Tribal Court and ordered that the claims relating to the second *Montana* exception would be heard before the Tribal Court of Appeals.

ANSWER: Defendant admits the allegations of the first sentence of paragraph 304, but denies that the May 8, 2012 Findings and Conclusions was effective for that purpose as it was superceded *nunc pro tunc* by the Amended, Nunc Pro Tunc Findings of Fact, Conclusions of Law, Opinion and Order issued by the Tribal Court of Appeals on June 26, 2012. *See* June 26, 2012 Amended Findings. The June 26 opinion also remanded the second *Montana* exception issue to the Trial Court. *Id.* at 62. Defendant admits the allegations of the second sentence of paragraph 304, but states that the January 14, 2013 Order to which that sentence refers was superceded by the Tribal Court of Appeals' February 5, 2013 Order ("TCA Order of Feb. 5, 2013"), which also revoked the earlier remand order, including that portion of the order that required the Tribal Court to hold an evidentiary hearing on whether the second *Montana* exception authorizes Tribal jurisdiction in this case, and ordered that hearing to instead be held before the Tribal Court of Appeals. *Id.* at 2 (revoking remand in the interest of time), 13 (finding that the Law and Order Code authorizes the Tribal Court of Appeals to revoke the remand order), 18 (revoking remand). *See also* Findings of Fact, Conclusions of Law, Opinion, and Order Re Attorney Fees and Costs (Jan. 14, 2013) ("Order of January 14, 2013") (making same determinations); Law and Order Code, ch. IV, § 2 (cases before the Court of Appeals are tried anew). The Tribal Court of Appeals also ruled – after the January 14, 2013 Order was issued – that it would "accept pre-trial motions as to any evidence that this Court doesn't have authority to revoke a remand to the Trial Court in an effort to save the parties additional time and money by hearing the foregoing issues itself." Corrected Minute Entry and Order, Nunc Pro Tunc (Jan. 31, 2013). FMC filed no such motion. And finally, a panel of the Tribal Court of Appeals that did not include Judge Gabourie or Judge Pearson, consisting instead of Chief Appellate Judge Cathy Silak and Appellate Judges Peter D. McDermott and Vern E. Herzog, subsequently

reaffirmed that the hearing on the second *Montana* exception issue would be held before the Tribal Court of Appeals. On May 28, 2013, the Tribal Court of Appeals held that "it will grant an evidentiary hearing on the 2nd *Montana* exception to jurisdiction commencing Tuesday, November 12, 2013 at 9:00 a.m. at the Fort Hall Justice Center." Order of May 28, 2013 at 3. The same order set a schedule for the proceedings in the Tribal Court of Appeals on the second *Montana* exception, with a discovery deadline of October 18, 2013. *Id.*[1] By stipulation of the parties, that schedule was modified to provide for discovery to close on February 17, 2014, and the evidentiary hearing to commence on April 1, 2014. Order of October 28, 2013. The evidentiary hearing was held from April 1 to April 15, 2014. May 16, 2014 Findings and Conclusions at 1. Finally, in further answer to the allegations of the second sentence of paragraph 304, Defendant denies the implication that the Order of January 14, 2013 was linked to the release of the videotape, as the January 14 Order itself explains the basis on which it was issued, *id*. at 2, 13, and in any event the issue of whether the Tribal Court of Appeals would hold a hearing on the second Montana exception was not finally resolved until May 28, 2013 when a panel that did not include Judges Gabourie and Pearson decided the issue. *See* Order of May 28, 2013.

305. Shortly after the videotapes were released, all three judges of the Tribal Court of Appeals, including Judges Gabourie and Pearson, were off the case.

ANSWER: Defendant denies the allegations of paragraph 305. On or about April 22, 2013, Judges Peter D. McDermott and Vern E. Herzog joined the Tribal Court of Appeals panel in this matter, in place of Judges Gabourie and Pearson; *see* Order of April 22, 2013 at 1; Judge

[1] The Law and Order Code, ch. IV, § 10, authorizes the Tribal Court of Appeals to subpoena the attendance of witnesses and to compel the production of books, records, documents or other "things necessary to the final disposition of the case on appeal."

Cathy Silak continued to sit on the panel until on or about October 28, 2013, *see* Order of October 28, 2013 (granting parties' stipulation to re-set date for the trial of the second *Montana* exception issue, and showing Judge Silak as a member of the panel). Judge John Traylor replaced Judge Silak on the panel on or before November 15, 2013. *See* Order of November 15, 2013 (signed by Judges Traylor, McDermott and Herzog).

306. Three new judges were appointed to this matter by the Business Council or its subordinates: Judge Peter McDermott, Judge Vern E. Herzog and Judge John Traylor. Judge John Traylor had formerly been employed by the Tribes.

ANSWER: Answering the allegations of paragraph 306, Defendant admits that Judges McDermott, Herzog, and Traylor were appointed to the Tribal Court of Appeals, and that Judge Traylor formerly worked for the Tribes. Judges McDermott and Herzog began sitting on the panel on or about April 19, 2013. *See* Order of April 22, 2013 at 1 (reciting that Chief Appellate Judge Cathy Silak and Appellate Judges Peter D. McDermott and Vern E. Herzog held a conference call on April 19, 2013). From that time forward, neither Judge Gabourie, nor Judge Pearson had any role in the proceedings before the Tribal Court of Appeals. Judge Taylor began sitting on the panel on November 15, 2013. *See* Order of November 15, 2013 (order signed by Judges McDermott, Herzog and Traylor). The judges on the new panel were hired by the Tribal Court Administrator Carina Cassel and their contracts were approved by the Business Council on her recommendation. Defendant therefore denies the allegation that they were appointed by the Business Council on its subordinates."

307. The new panel did not vacate or re-examine the May 2012 decision against FMC. Had there been a desire to expunge the partiality shown by Judges Gabourie and Pearson, the new panel would have vacated the May 2012 decision and re-considered the appeal. Instead, the

new panel kept the May 2012 decision in full force and effect, which was an endorsement of the partiality shown by Judges Gabourie and Pearson.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 307 because the new panel did re-examine the May 2012 decision. On April 22, 2013, the Tribal Court of Appeals informed the parties that Chief Judge Cathy Silak, and Judges McDermott and Herzog would hold a status conference with counsel on the appeals on May 10, 2013 "regarding the evidence of the second Montana exception to jurisdiction, breach of contract and failure to obtain air permits in appellants [*sic*] counterclaim." Order of April 22, 2013. In response to that order, FMC presented its due process claim to the Tribal Court of Appeals for the first time on May 6, 2013, *see* FMC Corporation's Pre-Hearing Brief Re: Case Management ("FMC Pre-Hearing Br."), attaching to its brief an affidavit stating that counsel for FMC had attended the March 23, 2012 educational seminar on which those arguments are based, and attaching a transcript of the presentation made by Judge Gabourie and Pearson at that seminar that a court reporter had prepared at FMC's request by reviewing a videotape of the seminar that FMC had received on January 10, 2013. Mitchell Decl. at 2, Ex. B.; FMC's Complaint ¶303 (reciting that FMC received the videotape on January 10, 2013). In its brief, FMC requested that the new panel vacate or re-examine the opinions issued by the former panel, FMC Pre-Hearing Br. at 4-5, stating that "[i]f the new panel adopts the appellate opinions of the former panel, the bias demonstrated by that panel will be a significant issue before the federal courts," *id.* at 24. The new panel of the Tribal Court of Appeals subsequently considered whether to vacate or adopt the orders and opinions of the prior panel. On the breach of contract issue the court held "there is no necessity of taking further evidence under breach of contract claim due to the fact that this court previously ruled FMC voluntarily entered into a contract in 1998 with the Shoshone-Bannock

Tribes for payment of 1.5 million per year;" and on the first *Montana* exception issue, the court "concluded that it has previously ruled that this court does have jurisdiction over respondent FMC Corporation under the first Montana exception, thus no further evidence will be received on this issue." Order of May 28, 2013 at 1, 3. On the second *Montana* exception issue, the Court reaffirmed that that it "will grant an evidentiary hearing on the 2nd Montana exception . . . ." *Id.* at 3.

Answering the allegations of the second sentence of paragraph 307, Defendant denies that partiality was shown by Judges Gabourie and Pearson, and therefore denies that there was any impartiality for the new panel to expunge, denies that the new panel did not reconsider the May 2012 decision, and admits that, after reconsideration, the new panel did not vacate the May 2012 decision. Answering the allegations of the third sentence of paragraph 307, Defendant denies that partiality was shown by Judges Gabourie and Pearson, denies that the new panel endorsed the partiality allegedly shown by Judges Gabourie and Pearson, and admits that the May 29, 2012 Decision, as superceded *nunc pro tunc* by the June 26, 2012 Decision, was kept in effect by the new panel, which reaffirmed that decision after re-examining it.

308. This odd procedure of having the Tribal Court of Appeals be the fact finder for a key issue violated due process in several ways.

ANSWER: Answering the allegations of paragraph 308, Defendant admits that appeals to the Tribal Court of Appeals are tried de novo*, see* Law and Order Code, ch. IV, § 2, denies the allegation that this is an "odd procedure," and denies the allegation that this procedure "violated due process in several ways" or in any way.

309. First, the decision to require a trial regarding the second *Montana* exception was prejudicial, since the Tribal Court of Appeals had already reached its decision. The Tribal Court

of Appeals had already determined that the Tribes had jurisdiction over FMC under the first *Montana* exception. After having found jurisdiction on one basis, a proceeding on the second basis would be unnecessary except to bolster its prior opinion by finding jurisdiction on a separate basis.

ANSWER: Answering the allegations of the first sentence of paragraph 309, Defendant denies that "the decision to require a trial regarding the second *Montana* exception was prejudicial," denies that when the Tribal Court of Appeals determined that a trial would be held on the second *Montana* exception issue, the Tribal Court of Appeals had already reached its decision on that issue, asserts that the Order of May 28, 2013 conclusively rejects any such contention, and denies that the Tribal Court of Appeals reached its decision on the second *Montana* exception issue at any time prior to April 15, 2014, when the decision was announced. Defendant admits the allegations of the second sentence of paragraph 309, as the Tribal Court of Appeals decided the first *Montana* exception on June 26, 2012, *see* June 26, 2012 Amended Findings, and that ruling was reaffirmed by the new panel of the Tribal Court of Appeals in the Order of May 28, 2013, *id*. at 3. Answering the allegations of the third sentence of paragraph 309, Defendant denies that a proceeding on the second *Montana* exception was "unnecessary," and denies that the proceedings on the second *Montana* exception "would be unnecessary except to bolster its prior opinion by finding jurisdiction on a separate basis," and asserts that FMC made these objections in the May 6, 2013 FMC Pre-Hearing Br., and that the Tribal Court of Appeals considered and rejected these contentions in the Order of May 28, 2013.

310. Second, members of the first Tribal Court of Appeals panel had already stated at the public seminar that they had decided that FMC had polluted the groundwater and the food of the Tribes. Consistent with that pre-judgment, the first Tribal Court of Appeals panel had also

already found that FMC had engaged in bad faith "where the underlying conduct gave rise to the creation of a Federal superfund Site that would have been abandoned and left to the Tribes to clean-up, had the government not stepped in . . . ." (January 14, 2013 Findings of Fact, p. 14). The Tribal Court of Appeals had also previously found that the Tribes' action against FMC would protect the health of 5,500 Tribal members, even though there was no evidence of any such fact. (January 14, 2013 Findings of Fact, p. 14). The new panel adopted and followed these findings.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 310. Defendant denies the allegation made in the second sentence of paragraph 310 that members of the Tribal Court of Appeals had prejudged the second *Montana* exception issue. Answering the remaining allegations of the second sentence and the allegations of the third sentence of paragraph 310, Defendant denies that the Tribal Court of Appeals' findings in support of its ruling on attorneys fees and cost in the Order of January 14, 2013, including the partial quotation from those findings that appears in the second and third sentences, prejudged the second *Montana* exception issue, nor could it have done so, since the second *Montana* exception was heard by a panel of the Tribal Court of Appeals that did not include any members of the panel that issued the Order of January 14, 2013. Defendant also denies the allegation of the second sentence of paragraph 310 that the new panel adopted the January 14, 2012 ruling of the prior panel and followed its findings, as the Order of January 12, 2012 was amended nunc pro tunc by the Order of February 5, 2013, and the findings on which the Plaintiff relies in the second sentence addressed attorneys fees and costs, not the second *Montana* exception, which was adjudicated by the new panel in 2014.

311. Third, the Tribal Court of Appeals had no jurisdiction to hold its own trial. The Tribal Law and Order Code gives jurisdiction to the Tribal Court of Appeals only to "review final orders, commitments and judgments" of the Tribal Court. (Law and Order Code, Ch. IV, § 2). The Tribal Court had not entered any order or judgment finding jurisdiction under the second *Montana* exception, so there was no such final order or judgment to review.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 311, as the Trial Court had jurisdiction over the final orders of the Tribal Court under the Law and Order Code, Chapter IV, § 2, which provides that the "[o]n appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the trial court," and this case was not tried to a jury in the Trial Court. Answering the allegations of the second sentence of paragraph 311, Defendant admits that Chapter IV, § 2 of the Tribal Law and Order Code, contains the language quoted in the second sentence, but denies that the Trial Court had not issued "final orders" and "judgments" in this case, and denies that the Tribal Court of Appeals did not have jurisdiction to hear the second *Montana* exception issue in this case under Chapter IV, § 2 after concluding that that the Trial Court had erred in failing to consider the second *Montana* exception issue, June 26, 2012 Amended Findings at 17, 61-62. Answering the allegations of the third sentence of paragraph 311, Defendant denies that the Trial Court's failure to consider the second *Montana* exception does not present an issue of tribal jurisdiction within the scope of the final orders or judgment of the Tribal Court. *See id*. at 15-17, 61-62. Defendant otherwise denies all of the allegations of paragraph 311.

312. Based on the first panel's statements, the decision regarding the second *Montana* exception had already been made. The only problem was that there was no factual record upon which to base such a decision.

ANSWER: Answering the allegations of the first sentence of paragraph 312, Defendant denies that the Tribal Court of Appeals' decision regarding the second *Montana* exception was made at any time made prior to April 15, 2014, and denies that it was made at any time "based on the first panel's statements." Defendant denies the allegations of the second sentence of paragraph 312.

313. Based on the facts and circumstances, on information and belief, the decision to hold a trial before the Tribal Court of Appeals was intended to allow the Tribal Court of Appeals to create a record upon which to base the decision it had already reached. When the needed factual record failed to develop, the Tribal Court of Appeals nonetheless reached the decision that had been pre-determined—that the Tribes have jurisdiction over FMC under the second *Montana* exception—by retreat to its erroneous legal determination regarding the second *Montana* exception.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 313, that "the decision to hold a trial before the Tribal Court of Appeals was intended to allow the Tribal Court of Appeals to create a record upon which to base the decision it had already reached," and denies that a decision had been reached on the second *Montana* exception issue at any time prior to April 15, 2014. Answering the allegations of the second sentence of paragraph 313, Defendant denies the allegation that "[w]hen the needed factual record failed to develop, the Tribal Court of Appeals nonetheless reached the decision that had been pre-determined;" denies that the Tribal Court of Appeals had pre-determined that the Tribes have jurisdiction over FMC under the second *Montana* exception; denies that the Tribal Court of Appeals "retreat[ed] to its erroneous legal determination regarding the second *Montana* exception" at any time, and asserts that the factual record made in Tribal Court of Appeals supports that court's April 15 and May

16, 2014 rulings on the second *Montana* exception issue, *see* April 15, 2014 Decision; May 16, 2014 Findings and Conclusions.

c. The Judgment is Not Entitled To Recognition Because the Judgment is Not From an Impartial Tribunal, But Instead From a Court That Was Dominated By the Business Council.

314. The judgment of the Tribal Court of Appeals cannot be enforced, because the judgment is not from an impartial tribunal. Instead, the judgment was issued by a court that the Business Council not only had the right to completely dominate, but by its actions the Business Council clearly did effectively dominate to achieve the result predetermined by the Business Council.

ANSWER: Answering the allegations of the first sentence of paragraph 314, Defendant denies the allegation that the judgment of the Tribal Court of Appeals cannot be enforced, denies the allegation that the judgment "is not from an impartial tribunal," and denies the allegation that the judgment cannot be enforced because it is allegedly "not from an impartial tribunal." Answering the allegations of the second sentence of paragraph 314, Defendant denies that the judgment was issued by a court that the Business Council had the right to dominate, whether completely or otherwise, denies that by its actions the Business Council did effectively dominate that court, whether clearly or otherwise, to achieve the result allegedly pre-determined by the Business Council, and denies that the Business Council had pre-determined the decision or the judgment of the Tribal Court of Appeals.

3. The Judgment Should Not Be Enforced Because it is Contrary to Public Policy.

315. The judgment of the Tribal Court of Appeals also should not be enforced because it is contrary to the public policy of the United States.

ANSWER: Defendant denies the allegations of paragraph 315.

316. FMC has consistently performed the investigation and remediation of the FMC Property in accordance with EPA directives. The Tribes have not presented any evidence that FMC has violated EPA directives in investigating the environmental conditions at its property and the overall EMF Site.

ANSWER: Defendant denies the allegations of paragraph 316.

317. The Tribes' complaint is not against FMC, but instead against the scientific, regulatory and policy decisions of EPA.

ANSWER: Defendant denies the allegations of paragraph 317.

318. The Tribes have long sought to be the decision-maker in relation to the FMC Site. They tried to do so by challenging the RCRA Consent Decree and the EPA's trust obligations, and failed before the District Court and the Ninth Circuit. *See United States v. FMC Corporation,* 229 F.3d 1161 (9th Cir. 2000) (unpublished opinion). They tried to do so by seeking to enforce the RCRA Consent Decree, to which they were not a party, which also failed before the Ninth Circuit. *United States v. FMC Corp.,* 531 F.3d 813 (9th Cir. 2008).

ANSWER: Defendant denies the allegations of the first and second sentences of paragraph 318. Answering the allegations of the third sentence of paragraph 318, Defendant denies that the Tribes sought to achieve the objectives alleged in the first sentence by seeking to enforce the RCRA Consent Decree in the litigation referenced in the third sentence, denies that the referenced litigation failed to achieve objectives which the Tribes did not have, and admits that the Court of Appeals for the Ninth Circuit held that the Tribes were not a party to the RCRA Consent Decree.

319. This matter represents another attempt by the Tribes to obtain the power to overrule the decisions that EPA is responsible for making regarding the FMC Property.

ANSWER: Answering the allegations of paragraph 319, Defendant denies that "[t]his matter represents another attempt by the Tribes to obtain the power to overrule the decisions that EPA is responsible for making regarding the FMC Property," and denies that the Tribes made earlier attempts to obtain such power.

320. For all of the reasons set forth above, the judgment of the Tribal Court of Appeals cannot be enforced because it violates the public policy of the United States.

ANSWER: Answering the allegations of paragraph 320, Defendant denies that the judgment of the Tribal Court of Appeals violates the public policy of the United States, denies that it cannot be enforced for that reason, and denies that it cannot be enforced for any or all of the reasons set forth in Plaintiff's complaint.

4. The Judgment Should Not Be Enforced Because it is Contrary to the Decisions Made by the EPA.

321. The decisions and Final Judgment of the Tribal Court of Appeals should also not be enforced because they conflict with decisions made by EPA.

ANSWER: Answering the allegations of paragraph 321, Defendant denies that the Final Judgment of the Tribal Court of Appeals should not be enforced, and denies that the Final Judgment of the Tribal Court of Appeals conflicts with decisions made by EPA.

322. As explained in Section IV.B of this Complaint, EPA has arrived at a number of determinations regarding the extent of contamination from the FMC. Those decisions are arrived at pursuant to a process of law followed by EPA.

ANSWER: Defendant admits the allegation of the first sentence of paragraph 322 that EPA has made a number of determinations regarding the contamination caused by FMC, but denies the allegation that EPA did so "[a]s explained [by Plaintiff] in Section IV.B of th[e]

Complaint." Defendant admits the allegations of the second sentence of paragraph 322, but denies that this sentence describes all elements of the decision making process followed by EPA.

323. The Tribal Court of Appeals ignored these determinations by deciding to base its determinations upon the lay opinions and perceptions of Tribal members, rather than the scientific and regulatory determinations of EPA.

ANSWER: Answering the allegations of paragraph 323, Defendant denies that the Tribal Court of Appeals ignored EPA's determinations, and denies that the Tribal Court of Appeals "decid[ed] to base its determinations upon the lay opinions and perceptions of Tribal members, rather than the scientific and regulatory determinations of EPA."

324. The Tribal Court of Appeals also ignored the EPA determinations by deciding that the FMC Property meets the second *Montana* exception because the FMC Property "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana,* 450 U.S. at 566. The judgment of the Tribal Court of Appeals necessarily rests on a finding that the FMC Property "imperils the subsistence of the tribal community" and that tribal action is "necessary to avert catastrophic consequences." *Plains Commerce Bank,* 554 U.S. at 341; *Evans,* 736 F.3d at 1306.

ANSWER: Defendant admits that the Tribal Court of Appeals found that the second *Montana* exception was satisfied in this case, but denies the allegation made in the first sentence of paragraph 324 that the Tribal Court of Appeals ignored EPA's determinations in so doing. Defendant denies the allegations of the second sentence of paragraph 324.

325. The Tribal Court of Appeals' determinations are flatly inconsistent with the determinations and decisions that EPA has made to effectively manage potential site risk in the short and long-term to ensure protection of human health and the environment.

ANSWER: Defendant denies the allegations of paragraph 325.

326. The Final Judgment of the Tribal Court of Appeals should not be enforced because it conflicts with the decisions and determinations made by EPA.

ANSWER: Defendant denies that the Final Judgment of the Tribal Court of Appeals conflicts with the decisions and determinations made by EPA and denies that the Final Judgment of the Tribal Court of Appeals should not be enforced for that alleged reason or for any other reason.

D. The Judgment Issued by the Tribal Court of Appeals Cannot Be Enforced by the Court, Because the Penal Law Rule Prohibits Enforcement of a Judgment for a Regulatory Fee or Penalty.

327. Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states. Restatement (Third) of the Foreign Relations Law of the United States, § 483 (1987); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219-20 (9th Cir. 2006).

ANSWER: Paragraph 327 alleges a bare conclusion of law to which no response is required, but to the extent a response is required, Defendant denies that the Restatement (Third) of Foreign Relations Law of the United States § 483 (1987) has any application to this case or to the Tribal Court Judgment, denies that the decision in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219-20 (9th Cir. 2006) has any application to this case or to the Tribal Court Judgment, denies that the common law rule against the enforcement of penal judgments has any application to this case or to the Tribal Court Judgment, and denies that the allegations of paragraph 327 correctly characterize the cited authorities, which must be read in the context of the cited authorities as a whole and with reference to other applicable law.

328. This well-established principle of comity applies to this Judgment of the Tribal Court of Appeals, because "the recognition and enforcement of tribal judgments in federal court

must inevitably rest on the principles of comity." *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997).

ANSWER: Paragraph 328 alleges a conclusion of law to which no response is required, but to the extent a response is required, Defendant denies the allegations of paragraph 328 because neither the Restatement (Third) of Foreign Relations Law of the United States § 483, nor the common law rule against the enforcement of penal judgments has any application to this case or to the Tribal Court Judgment under the *Wilson* decision or otherwise, and denies that the allegations of paragraph 327 and 328 apply to this case or to the Tribal Court Judgment.

329. The Judgment is based entirely on a penalty or fee assessed based on regulations of the Tribes. The Judgment requires that the penalty or fees be paid entirely to the Business Council and the LUPC, rather than to any individual. For these reasons, the Judgment issued by the Tribal Court of Appeals is a penal judgment that should not be enforced by this Court.

ANSWER: The allegations of the first sentence of paragraph 329 assert a conclusion of law to which no response is required. To the extent a response is required, Defendant denies the allegations of the first sentence, which misstate and inaccurately characterize the Tribal Court Judgment and the opinions of the Tribal Court of Appeals on which that judgment is based, denies that the Tribal Court Judgment "is based entirely on a penalty or fee assessed based on regulations," denies that FMC's obligation to obtain a waste storage permit and pay the annual permit fee, either under the terms of its agreement with the Tribes, or pursuant to the LUPO, the LUPO Guidelines as amended in 1998, and the HWMA, is a "tax[], fine[], or penalt[y]" within the meaning of § 483 of the Restatement (Third) of the Foreign Relations Law of the United States, or is subject to the common law rule against the enforcement of penal judgments, even assuming, *arguendo*, that either was relevant to this case. Defendant denies the allegations of the

second sentence, except the allegation that the Tribal Court Judgment is not paid to an individual. Answering the allegations of the third sentence, Defendant denies that the Tribal Court Judgment is a penal judgment, denies that it that should not be enforced by this Court, and denies that the allegations of the first two sentences of paragraph 329 support the legal conclusion stated in the third sentence.

V. CAUSES OF ACTION

A. First Cause of Action: Declaratory Judgment.

330. FMC re-alleges and incorporates by reference the above allegations as if fully set forth herein.

ANSWER: Defendant realleges and reincorporates by reference its answer to the above allegations as if fully set forth herein.

331. The question of the Tribes' jurisdiction over FMC is a federal question. FMC is entitled to declaratory judgment holding that the Tribes lack jurisdiction over FMC.

ANSWER: Defendant admits that the question of the Tribes' jurisdiction over FMC is a federal question, as alleged in the first sentence of paragraph 331. Defendant denies the allegations of the second sentence of paragraph 331.

332. At all judicial stages of the Tribal proceedings, FMC has challenged the Tribes' jurisdiction under *Montana v. United States,* 450 U.S. 544 (1981) and its progeny.

ANSWER: Defendant denies the allegations of paragraph 332 except to the extent that the term "Tribal proceedings" refers to the proceedings in the Shoshone-Bannock Tribes Court of Appeals and Trial Court that are the subject of this action.

333. The Tribal Court of Appeals' Opinion and Order constitutes a final Tribal Court determination of Tribal jurisdiction over FMC's conduct and activities on the FMC Property.

ANSWER: Answering the allegations of paragraph 333, Defendant admits that the Tribal Court of Appeals 2012 and 2014 Opinions in this matter are final decisions of the Shoshone-Bannock Tribes Tribal Judiciary on the matters addressed therein, but denies that these opinions decide other questions of Tribal jurisdiction.

334. FMC has no further recourse in Tribal Court to prevent the erroneous exercise of Tribal jurisdiction.

ANSWER: Defendant denies the allegation of paragraph 334 that the Tribal Court's exercise of jurisdiction in this case was erroneous, and admits that FMC's challenge to the exercise of that jurisdiction has been finally adjudicated by the Tribal Courts of the Shoshone-Bannock Tribes.

335. For all of the reasons set forth above, the Tribes do not have jurisdiction over the conduct of FMC on its fee-owned land.

ANSWER: Defendant denies the allegation of paragraph 335 that the Tribes do not have jurisdiction over the conduct of FMC on its fee-owned lands in this case, and denies the allegation that the Tribes do not have such jurisdiction for all or any of the reasons set forth in Plaintiff's complaint.

336. FMC is entitled to declaratory judgment that the Tribes lack jurisdiction over FMC and that the Tribes' Judgment is void and unenforceable against FMC.

ANSWER: Defendant denies the allegations of paragraph 336.

B. Second Cause of Action: Injunctive Relief.

337. FMC re-alleges and incorporates by reference the above allegations as if fully set forth herein.

ANSWER: Defendant realleges and reincorporates by reference its answer to the above allegations as if fully set forth herein.

338. The Tribes have threatened to seek enforcement in federal court of the Judgment that the Tribal Court of Appeals entered against FMC.

ANSWER: Defendant admits the allegations of paragraph 338, but denies that the Tribes are presently seeking to enforce the Tribal Court Judgment through any means other than this action.

339. FMC has no adequate remedy at law for the above-mentioned conduct of the Tribes. This action for injunctive relief is FMC's only means for securing relief.

ANSWER: Defendant denies the allegations of the first sentence of paragraph 339. This action provides FMC with an adequate remedy at law without the need for injunctive relief as it will determine the existence of Tribal jurisdiction over FMC and whether the Tribal Court judgment must be recognized and enforced by the court. Defendant denies the allegations of the second sentence of paragraph 339.

340. The Court should grant preliminary and permanent injunctive relief to FMC enjoining the Tribes from enforcing the Judgment or pursuing further claims against FMC in the Tribal Courts.

ANSWER: Defendant denies the allegations of paragraph 340.

VI. RELIEF REQUESTED

WHEREFORE, Plaintiff prays for the following relief:

A. For a declaratory judgment pursuant to 28 U.S.C. §2201 that the Shoshone-Bannock Tribes may not assert jurisdiction over FMC in the action currently filed in Tribal Court or in any other Tribal administrative or judicial forum.

ANSWER: Defendant denies that Plaintiff is entitled to this relief.

B. For a preliminary injunction pursuant to Fed. R. Civ. P. 65 enjoining the Shoshone-Bannock Tribes, their agents, employees, successors and assigns from further proceedings involving FMC in Tribal Court.

ANSWER: Defendant denies that Plaintiff is entitled to this relief.

C. For a permanent injunction pursuant to Fed. R. Civ. P. 65 enjoining the Shoshone-Bannock Tribes, their agents, employees, successors, and assigns from further proceedings involving FMC in Tribal Court.

ANSWER: Defendant denies that Plaintiff is entitled to this relief.

VII. DEFENSES

1. FMC's complaint fails to state a claim upon which relief can be granted to the extent that it seeks review of the merits of the Tribal Court of Appeals decisions, *see* 2012 TCA Op., TCA Order of May 28, 2013, 2014 TCA Dec., 2014 TCA Op., as the merits of those decisions are not subject to review by this Court, *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002). Review of the Tribal Court decisions is limited to questions of federal law that are relevant to a tribal court's decision on tribal jurisdiction. *Id*.

2. Paragraphs 327 through 329 of FMC's complaint fails to state a claim upon which relief can be granted because neither the Restatement (Third) of Foreign Relations Law § 483, nor the common law rule against enforcement of penal judgments have any application to this case.

VIII. AFFIRMATIVE DEFENSES

1. FMC is judicially estopped from claiming that the Tribes lacked jurisdiction over it under the first *Montana* exception. FMC successfully sought the entry of a Consent Decree which stated that FMC voluntarily agreed to obtain tribal permits. FMC then successfully litigated an appeal of the entry of that Consent Decree by arguing that the Tribes were obtaining

benefits from their consensual relationship and that the Tribes had issued valid permits for the storage of waste on the Reservation. Having won on these positions, FMC is judicially estopped from now arguing a contradictory argument before this Court.

2. FMC has waived its due process arguments about the structure of tribal government, undue influence of the Business Council and based on the remarks of two appellate judges at a law school seminar at the University of Idaho Law School. FMC failed to raise before the Trial Court and Tribal Court of Appeals its allegations that the structure of the tribal government deprives it of due process in this case and that the Business Council exercised undue influence over the LUPC, Trial Court and Tribal Court of Appeals. It has waived the right to raise them here. By failing to timely and adequately present to the Tribal Court of Appeals its objections based on the remarks of the appellate judges at a law school seminar or to the Tribal Court of Appeals' authority to hold an evidentiary hearing on the question of the Tribes' jurisdiction under the second *Montana* exception, FMC waived those objections and may not raise them here.

COUNTERCLAIM

The Shoshone-Bannock Tribes ("Tribes") hereby counterclaim against FMC Corporation ("FMC") under Fed. R. Civ. P. 13(a).

I. INTRODUCTION

1. By this counterclaim the Tribes seek an order of this Court recognizing and enforcing the judgment of the Shoshone-Bannock Tribal Court of Appeals ("Tribal Court of Appeals") rendered against FMC on May 16, 2014, in the amount of nineteen million five-hundred thousand dollars ($19,500,000.00), plus nine hundred twenty-eight thousand dollars and fifty cents ($928,220.50) in attorney fees, and ninety-one thousand ninety seven dollars and ninety-one cents ($91,097.91) in costs. *See* Shoshone-Bannock Tribal Court of Appeals

judgment of May 16, 2014 ("Tribal Court Judgment"); Shoshone-Bannock Tribal Court of Appeals Amended, Nunc Pro Tunc Findings of Fact, Conclusions of Law, Opinion and Order of June 26, 2012 ("2012 TCA Op."); Shoshone-Bannock Tribal Court of Appeals Order of May 28, 2013 ("TCA Order of May 28, 2013"); Shoshone-Bannock Tribal Court of Appeals Final Statement of Decision of April 15, 2014 ("2014 TCA Dec."); Shoshone-Bannock Tribal Court of Appeals Opinion, Order, Findings of Fact and Conclusions of Law of May 16, 2014 ("2014 TCA Op.").

2. In *Wilson v. Marchington*, 127 F.3d 805, 809-13 (9th Cir. 1997), the Ninth Circuit held that "as a general principle, federal courts should recognize and enforce tribal judgments" under principles of comity. A federal court has authority to do so provided that: (1) the tribal court had both personal and subject matter jurisdiction, and (2) the defendant was afforded due process of law. *Id*. at 810. The Tribal Court Judgment should be recognized and enforced because the Tribal Court of Appeals had personal jurisdiction over FMC, afforded FMC due process of law, and had subject matter jurisdiction over FMC under the two exceptions articulated by the Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), 2012 TCA Op. at 14-15; 2014 TCA Op. at 11-15. *See Wilson*, 127 F.3d at 810.

3. From 1947 until 2001, FMC produced elemental phosphorus and generated hazardous and non-hazardous waste on fee land owned by FMC (the "FMC Property") within the boundaries of the Shoshone-Bannock Tribes' Fort Hall Reservation ("Reservation"). 2014 TCA Op. at 5-6 (citing EPA, Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho at 83 (2012) ("IRODA")). FMC's Plant stopped producing phosphorus in 2001, but FMC continues to store twenty-two million (22,000,000) tons of hazardous and non-hazardous waste on the surface and subsurface of the FMC Property. *Id*. at

2. That waste includes arsenic and other heavy metals, millions of tons of radiation–emitting slag, and as much as sixteen thousand (16,000) tons of phosphorus, which is toxic to humans when inhaled, ingested or absorbed and explodes or catches on fire when exposed to air. 2014 TCA Op. at 2, 6. The phosphorus-contaminated waste, which is stored in numerous ponds on the FMC Property, also generates poisonous gases, including phosphine. *Id*. at 7. FMC also buried twenty-one (21) railroad tanker cars containing phosphorus sludge on its Reservation property in 1964. *Id.* at 7-8. FMC's waste contaminates Reservation lands, surface waters, groundwater, and natural and cultural resources including the Portneuf River, and the Fort Hall Bottoms. 2014 TCA Op. at 6, 8-9, 14-15; 2014 TCA Dec. at 12-13. As a result of the contamination, the Sundance ceremony no longer relies on the resources of the Portneuf River and Fort Hall Bottoms, and Tribal ceremonial and subsistence activities on and along the River have been seriously and substantially impacted. 2014 TCA Op. 8, 13-14; 2014 TCA Dec. at 29. Accordingly, this Court should recognize and enforce the Tribal Court judgment. *See Wilson*, 127 F.3d at 810.

4. The Shoshone-Bannock Tribal Courts had personal jurisdiction over FMC, as the FMC Property is on the Reservation, and FMC has substantial contacts on the Reservation. The proceedings in the Tribal Courts also provided due process to FMC, which was represented by counsel throughout the proceedings before the Land Use Policy Commission, the Business Council, the Trial Court and the Tribal Court of Appeals. Those proceedings were conducted in accordance with the Constitution and Bylaws for the Shoshone-Bannock Tribes, the Law and Order Code of the Shoshone-Bannock Tribes ("Law and Order Code"), the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1326, and other applicable federal law. In accordance with the Law and

Order Code, the Tribal Court of Appeals reviewed the Trial Court's rulings de novo. *Id*. ch. IV, § 2.

5. The Tribal Court of Appeals also correctly held that the Tribes have subject matter jurisdiction over FMC to enforce the Tribal permit requirements under both *Montana* exceptions, which prescribe when Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians on fee lands within their reservations. First, a tribe may regulate "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana,* 450 U.S. at 565. The Tribal Court of Appeals correctly held that "FMC's agreement for payment and the actual performance of tendering such payment of the $1.5 million annual permit to the Tribes from 1998 to 2001 is precisely the type of commercial dealing contemplated in the first exception of *Montana*," 2012 TCA Op. at 14, and that the exchange of letters between FMC and the Tribes in 1998 constituted a binding contract in which FMC agreed to pay the $1.5 million annual fee. *Id*. at 26-27, 40-42; TCA Order of May 28, 2013 at 1, 3. Second, a tribe may exercise civil jurisdiction when the conduct of non-Indians on fee lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Tribes have jurisdiction under this exception because the enormous quantity of hazardous and non-hazardous waste stored on the Reservation by FMC, the toxicity of the stored waste, including its reaction upon exposure to air or water, and the mobility of the contaminants in the stored waste have a direct and threatened effect on Tribal lands, waters, natural and cultural resources, on the use of those resources by Tribal members, and on the Tribes and its members themselves. 2014 TCA Op. at 11-15; TCA Dec. at 7, 12, 17-31.

II. JURISDICTION

6. This Court has jurisdiction over the Tribes' counterclaim under 28 U.S.C. § 1331 because whether to recognize and enforce a tribal court judgment is a decision governed by federal law, *Wilson*, 127 F.3d at 813, as is the existence of tribal jurisdiction under the *Montana* exceptions, *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990). This Court also has jurisdiction under 28 U.S.C. § 1362, as the Shoshone-Bannock Tribes is a federally-recognized Indian tribe with a governing body duly recognized by the Secretary of the Interior, and pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction).

III. VENUE

7. Venue in this judicial district is proper under 28 U.S.C. § 1391 because this is the judicial district in which the events giving rise to the claims arose.

IV. PARTIES

8. The Shoshone-Bannock Tribes is a federally-recognized Indian Tribe located on the Fort Hall Reservation in southeastern Idaho.

9. FMC Corporation is a chemical company headquartered in Philadelphia, Pennsylvania, and incorporated under the laws of Delaware.

V. RECOGNITION AND ENFORCEMENT OF TRIBAL COURT JUDGMENTS

10. In *Wilson*, 127 F.3d at 809-13, the Ninth Circuit held that "as a general principle, federal courts should recognize and enforce tribal judgments" under principles of comity. Comity "'is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.'" *Id.* at 810 (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). While Indian tribes are "'dependent domestic nations'" and "present[] some unique circumstances," the

Ninth Circuit concluded that "comity still affords the best general analytical framework for recognizing tribal judgments." *Id.*

11. A federal court has authority to recognize and enforce a tribal court judgment where it is shown that: (1) the tribal court had both personal and subject matter jurisdiction, and (2) the defendant was afforded due process of law. *Id*. Due process means that "there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." *Id.* at 811. Review under the principles of comity does not extend to the merits of the case, "which should not . . . be tried afresh, as on a new trial or an appeal, upon the mere assertion that the judgment was erroneous in law or in fact." *Id.* at 810 n.4 (quoting, *Hilton*, 159 U.S. at 202-03).

12. The standard of review applicable to tribal court rulings on tribal jurisdiction is de novo. *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) (citing *FMC*, 905 F.2d at 1313-14). Because "tribal courts are competent law-applying bodies," the tribal court's determination of its own jurisdiction is entitled to "some deference." *FMC*, 905 F.2d at 1313 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66 (1978)). Review is limited to questions of federal law that are relevant to a tribal court's decision on tribal jurisdiction. *AT&T Corp*., 295 F.3d at 904. "[F]ederal courts may not readjudicate questions – whether of federal, state or tribal law – already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other reason." *Id*. *See also Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010) ("[t]he rule is clear that federal courts do not conduct de novo review over tribal court rulings under tribal law").

13. The standard of review applicable to a tribal court's findings of fact is "a deferential, clearly erroneous standard of review," which "accords with traditional judicial policy of respecting the factfinding ability of the court of first instance." *FMC*, 905 F.2d at 1313. *Accord, Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1206 n.1 (9th Cir. 2001); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) (citing *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006); *FMC*, 905 F.2d at 1313-14 (9th Cir. 1990)). "A finding of fact is clearly erroneous 'if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (quoting *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1087 (9th Cir. 2011)). "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *In re Rifino*, 245 F.3d 1083, 1086 (9th Cir. 2001) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)).

VI. ALLEGATIONS

Background facts concerning the Fort Hall Reservation

14. The Shoshone-Bannock Tribes is a federally recognized Indian tribe, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1946 (Jan. 14, 2015), residing on the Fort Hall Reservation. The Reservation, which was intended to comprise 1.8 million acres within the Tribe's aboriginal territory, was first set aside by an 1867 Executive Order. Executive Order of President Andrew Johnson (June 14, 1867), *reprinted in* 1 *Indian Affairs, Law and Treaties* 836-837 (Charles J. Kappler, ed.) (1904). By the Fort Bridger Treaty, made on July 3, 1868 ("1868 Treaty"), the United States established the Fort Hall Reservation as the "permanent home" of the Shoshone and Bannock people for their "absolute and undeterred use and occupation." 1868 Treaty, arts.

2, 4, July 3, 1868, 15 Stat. 673. *See also* Executive Order of President Ulysses Grant (July 30, 1869), *reprinted in* 1 *Indian Affairs, Laws and Treaties* 838 (implementing the Fort Bridger Treaty). As a result of late 19th century land cession agreements, the Reservation now encompasses 870 square miles, the overwhelming majority of which – ninety-six percent as of 1990 – is held in trust for the Tribes and its members. *FMC*, 905 F.2d at 1312.

15. The Reservation has a horseshoe shape, with a thick arch on the north, and legs that extend south, the western leg longer than the other. The lands within the interior of the horseshoe were ceded to the United States by the Tribes in the Agreement of February 5, 1898, which was ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 672.[2] As promised in the 1868 Treaty, the Reservation includes a "reasonable portion[] of the PortNeuf" country. 1868 Treaty, art. 2. The Portneuf River enters the Reservation's western leg northwest of Pocatello and then runs northwest through the Reservation to the American Falls Reservoir, which lies partly within the Reservation. The lands known as the Fort Hall Bottoms are adjacent to the river's north bank, and run from the American Falls Reservoir to a point generally north of Batiste Spring. *See* IRODA, fig. 2 (titled "EMF Regional Setting"). The Portneuf River and the Fort Hall Bottoms are critical Tribal resources for religious, ceremonial, cultural and subsistence purposes. 2014 TCA Dec. at 16, 29-30, 2014 TCA Op. at 8-9, 12-13.

16. The Tribes hold rights to the Reservation's natural resources under the 1868 Treaty, including rights to its waters, *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963), and rights to hunt, fish, and gather, *see Menominee Tribe v. United States*, 391 U.S. 404 (1968). The Tribes' rights to divert and use Reservation waters are a matter of settled federal law. *See* Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-

[2] In the 1898 Agreement, the Tribes retained use rights on the ceded lands. *Id*. art. IV. *See Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983).

602, 104 Stat. 3059 ("Fort Hall Act"). Section 4 of the Fort Hall Act "approved, ratified, and confirmed" the Fort Hall Indian Water Rights Agreement, *id*. at 3060, which provides that under the *Winters* Doctrine, the Tribes have the right to use waters "arising on, under flowing across, adjacent to, or otherwise appurtenant to the Reservation . . . ." 1990 Fort Hall Indian Water Rights Agreement § 6.1. Under the Agreement, the Tribes have the rights to use water from the Portneuf River, 1990 Fort Hall Indian Water Rights Agreement § 7.1.14, and to use water stored in the American Falls Reservoir, *id*. § 7.3.1, as well as water from other on-Reservation sources.

Background facts concerning the Tribal Government

17. The Tribes exercise their sovereign authority under the Constitution and Bylaws for the Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho ("Tribal Constitution"), which was adopted under the Indian Reorganization Act, 25 U.S.C. §§ 461-479. 2012 TCA Op. at 11. Under Article III of the Tribal Constitution, the Tribes' governing body is the Fort Hall Business Council, an elected body of seven members. Tribal Const. art. III, § 1. The Constitution provides that the Business Council elects a chairman, vice chairman, secretary, and treasurer from within its own body. *Id*. § 5. Each of these officers' duties is spelled out in the Bylaws, art. I, §§ 1-4.

18. The Business Council is constitutionally empowered to enact laws to, *inter alia*, raise revenue by levying taxes and license fees on members and, subject to review by the Secretary of the Interior ("Secretary"), nonmembers as well, Tribal Const. art. VI, § 1(h); safeguard the safety and general welfare of the Reservation, with ordinances directly affecting nonmembers to be subject to review by the Secretary; *id*. § 1(*l*), maintain law and order and administer justice by establishing a reservation court and defining its duties and powers, *id*. § 1(k), and "preserve native arts, crafts, culture, and Indian ceremonials," *id*. § 1(q). The Business Council also has authority to negotiate with Federal, State, and local governments on behalf of

the Tribes, *id*. § 1(a); appropriate funds for public purposes of the Reservation, *id*. § 1(g); and exercise additional powers delegated to it by the Federal Government, *id*. § 3.

19. In the exercise of its Constitutional authority, the Business Council established the Shoshone-Bannock Tribal Court and defined its duties and powers. Under the Law and Order Code, the tribal judiciary is comprised of a chief judge, two associate judges, a contracted special judge and three appellate judges. *See* Law and Order Code, ch. I, § 1 (creation and establishment of the Tribal Court); *id.*, ch. IV, § 1 (creating a Court of Appeals). The Judicial Council oversees the tribal judiciary, Shoshone-Bannock Tribes Judicial Council Ordinance § 2 (Apr. 27, 2010), and tribal judges are appointed by the Business Council from qualified candidates selected by the Judicial Council, *id.* § 2(D). The Chief Judge serves a term of five years, and Associate Judges serve a term of three years. Law and Order Code, ch. I, § 3.4. Tribal judges are subject to a Code of Conduct. *See* Shoshone-Bannock Tribes Code of Judicial Conduct (May 14, 2010). Finding that "[a]n independent and honorable tribal judiciary is indispensable to justice in our community," the Code of Judicial Conduct requires tribal judges to "be faithful to the law and maintain professional competence in it" and "perform judicial duties without bias or prejudice." *Id*. R. 1(A), 3(B)(2), (5). It further requires tribal judges, *inter alia*, to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," to "not be swayed by partisan interests, public clamor, political pressure, or by fear of criticism," and to avoid extra-judicial activities that "cast reasonable doubt on the judge's capacity to act impartially as a judge." *Id*. R. 2(A), 3(B)(2), 4(A)(1). A judge must "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonable be questioned, . . ." *Id*. Rule 3(E)(1).

20. Pursuant to Chapter I, § 2(b) of the Law and Order Code, the Tribal Court has original jurisdiction over "[a]ll civil actions arising under this Code or at common law in which the defendant is found within the Fort Hall Reservation and is served with process within, or who is found outside the Fort Hall Reservation and is validly served with process." 2012 TCA Op. at 17 (alteration in original). In civil cases the Tribal Court applies the Law and Order Code, tribal ordinances, traditional customs and usages, federal law, and Interior regulations. *Id*. ch. III, § 1.1. Appeals to the Tribal Court of Appeals are heard de novo. Law and Order Code, ch. IV, § 2 ("On appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the trial court.").

21. The Tribes regulate the use of the land, waters, and natural resources of the Reservation under the terms of the Law and Order Code. As is especially relevant here, the Tribes enacted the Land Use Policy Ordinance ("LUPO"), by resolution of April 26, 1975, and it was approved by the BIA on February 3, 1977 and March 9, 1977. 2012 TCA Op. at 11. The LUPO was later amended, effective February 2, 2010, but as the matters involving application of the LUPO at issue in this case were all determined under the LUPO as it existed prior to the effective date of the amendments, all references in this counterclaim are to the LUPO as it existed prior to its amendment. The LUPO recognizes that "the control of the use of the lands and natural resources within the outer confines of the Fort Hall Reservation has a direct effect on the ability of the Shoshone-Bannock Tribes to safeguard and promote the peace, safety, morals and general welfare of all who may choose to reside within the outer confines of the Reservation . . . ." *Id.* pmbl. The LUPO applies to "all lands and waters and natural resources within the outer confines of the Reservation . . . ." *Id.*

22. The purposes of the LUPO include "protect[ing] the present character of the Fort Hall Reservation," *id.* art. I, § 2(1), "insur[ing] clean air and water, open space and a quality human environment," *id.* § 2(2), and "promot[ing] the promoting the orderly and economic growth to the Fort Hall Reservation and the peace, safety, morals and general welfare of the inhabitants of the Fort Hall Reservation," *id*. § 2(4). The LUPO establishes and defines four land use classifications, agricultural, mining, industrial, and urban and commercial, *id.* § 3(1)-(4), which are shown on the Official Land Use Map of the Fort Hall Bottoms, which is made a part of the LUPO, *id.* art. II. The LUPO also established the Land Use Policy Commission ("LUPC"), which is "empowered and charged with the administration and enforcement of [the LUPO]." *Id.* art. IV, § 1. The LUPO requires that a permit be obtained for all industrial and commercial uses of land and natural resources, and for the use of land which is contrary to the provisions of the LUPO. *Id.* art. III, §§ 1-2; art. V, § 1. The LUPO sets out procedures for obtaining a permit, *id.* art. V, § 3, requires that a hearing be held on all permit applications, and provides for the right of appeal from decisions of the LUPC, *id*. § 6.

23. By resolution of August 24, 1979, the Tribes enacted the Fort Hall Land Use Operative Policy Guidelines ("LUPO Guidelines"), which implement the LUPO's terms, including its permitting requirements and enforcement provisions. *Id.* chs. V, VIII. The LUPO Guidelines also authorize the LUPC to amend their terms after allowing for public comment, or if the LUPC deems it necessary, a public hearing, *id*. §§ I-7, I-7-1, and further provide that amendments are effective "upon formal review thereof by the [LUPC], and [that] review or approval of such amendments by the Business Council shall not be required," *id*. § I-7-3. *See* 2012 TCA Op. at 28. The LUPO Guidelines were submitted to the BIA on August 24, 1979, and became effective November 22, 1979. 2012 TCA Op. at 11-12.

24. In 1998, the LUPC amended Chapter V of the Guidelines ("1998 Guideline Amendments"), which sets out the procedures and standards for issuance of permits. In promulgating those amendments, the LUPC found that "hazardous waste and substances have been disposed of and stored on the Fort Hall Reservation for many years in a manner that was careless, improper and inappropriate and created conditions which are extremely dangerous and may cause adverse public health and environmental impacts." *Id*. § V-9-1. The purpose of the amendments is to "prevent further degradation of the environment and to protect the public health, safety, and welfare of Fort Hall Reservation residents" by "establish[ing] siting, disposing, and storage fees to reduce the amount of hazardous waste deposited, sited, or stored on the Fort Hall Reservation and associated hazards to the health and well-being of residents of the Fort Hall Reservation," and requiring the LUPC to "utilize the hazardous waste fees for administration, management and oversight of the existing hazardous waste disposal sites and storage on the Fort Hall Reservation . . . ." *Id.* The 1998 Guidelines Amendments impose a hazardous waste storage fee of five dollars ($5.00) per ton, which is to be paid annually and be accompanied by a permit application, which if granted is valid for one year. *Id*. § V-9-2(A) to (B). The permit fees are to be "deposited in the Shoshone-Bannock Hazardous Waste Management Program Fund," and used "to pay the reasonable and necessary costs of administrating the Hazardous Waste Management Program." *Id.* § V-9-2(B). The LUPO and the LUPO Guidelines, as amended in 1998, authorize the LUPC to set the annual permit fee for a waste storage permit for FMC at one million five hundred thousand dollars ("$1.5 million"). 2012 TCA Op. at 29-30.

25. The Tribes subsequently enacted the Hazardous Waste Management Act ("HWMA"). The HWMA was enacted by resolution of October 19, 2001, and approved by the

Bureau of Indian Affairs on October 26, 2001. TCA Order of May 28, 2013 at 2-3; 2012 TCA Op. at 12. The HWMA is to be administered by the Hazardous Waste Management Program. *Id.* § 201. The HWMA requires a permit for the storage of hazardous waste, *id*. §§ 302(B), 409(C), and imposes a five dollar ($5.00) per ton annual storage fee for hazardous waste and one dollar ($1.00) per ton annual storage fee for non-hazardous waste, *id*. § 409(B). *See* 2012 TCA Op. at 33. Waste storage fees collected under section 409 "shall be deposited in the [Hazardous Waste Management] Program fund and appropriated for the purposes for which collected." HWMA § 409(D). The HWMA also authorizes the LUPC to set the annual permit fee for a waste storage permit for FMC at $1.5 million. 2012 TCA Op. at 30, 33.

26. The Tribes enacted the Waste Management Act ("WMA") by resolution on September 8, 2005. The BIA approved the WMA by letter dated October 7, 2005. 2012 TCA Op. at 12. The WMA authorizes the Tribes' Environmental Waste Management Program to "protect the public health, safety, and welfare of Tribal members and residents of the Reservation" by establishing a framework for the regulation and management of waste on the reservation and establishing procedures for the safe "generation, storage, treatment, disposal, and siting of wastes . . . ." WMA § 101(D)(1), (3). In 2010, the Tribes promulgated regulations under the WMA that established cleanup standards for contaminated soils. *See* Shoshone-Bannock Tribes Waste Management Act, Soil Cleanup Standards for Contaminated Properties.

27. The HWMA is superseded by the WMA only to the extent that the HWMA is inconsistent with, or contrary to, the purposes of the WMA. WMA § 1003. Because no provisions of the HWMA are inconsistent with, conflict with, or are contrary to the purposes of the WMA, the HWMA hazardous and non-hazardous waste storage fee schedule remains in effect. 2012 TCA Op. at 12.

28. The Tribes also exercise concurrent jurisdiction with the federal government over the Reservation's air and water resources under the Clean Water Act and the Clean Air Act, which includes jurisdiction over activities on non-Indian owned fee land. In 2008, EPA determined that the Tribes were eligible for Treatment as a State ("TAS") under the Clean Water Act ("CWA"), 33 U.S.C. § 1377(e); 40 C.F.R. § 131.8. EPA, *Decision Document: Approval of the Shoshone-Bannock Tribess* [sic] *Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act* 7-8 (2008) ("EPA Decision"). EPA made that determination by applying the *Montana* test, under which it concluded that "both actual and potential non-member activities" on leased trust and fee land in the Reservation, *id.* at 10, App. I at 15-23, including at the FMC Property, *id.* App. I at 21-22, pose threats to tribal waters that justify the exercise of tribal jurisdiction, *id.* App. I at 9-12. In so holding, EPA relied on the second *Montana* exception, under which EPA:

> Evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878 (noting that in *Brendale v. Confederated Tribes & Bands of the Yakama Indian Nation*, 492 U.S. 408, 431 (1989) (opinion of White, J.), several justices argued that for a tribe to have a "protectible interest" in a nonmember activity under *Montana*'s second exception, the activity's effect should be "demonstrably serious"); see also *Atkinson Trading Co*., 532 U.S. at 659. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation necessarily depends on the specific circumstances presented by the tribe's application. 56 Fed. Reg. at 64878. In addition, in that rulemaking, EPA noted as a general matter "that activities which affect surface water and critical habitat quality may have serious and substantial impacts" and that, "because of mobile nature of pollutants in surface waters and the relatively small length/size of stream segments of other water bodies on reservations. . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands." *Id*. EPA also noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government. *Id*. at 64879.

EPA Decision at 10. EPA also found that the second *Montana* exception:

> does not require a tribe to demonstrate to EPA that nonmember activity "is actually polluting tribal waters," if the tribe shows "a potential for such pollution in the future," *Montana v. EPA*, 141 F. Supp. 2d 1249, 1262 (D. Mont. 1998), quoting *Montana v. EPA*, 941 F. Supp. 945, 952 (D. Mont. 1996), *aff'd* 137 F.3d 1135, 1140-41 (9th Cir. 1998)(citing "the threat inherent in impairment of the quality" of a source of reservation water), *cert. denied* 525 U.S. 921 (1988). Thus, EPA considers both actual and potential nonmember activities in analyzing whether a tribe has authority over nonmember activities under the Clean Water Act.

Id. EPA expressly recognized the threats that contamination of the surface waters of the Reservation and the Fort Hall Bottoms poses to the Fort Hall Bottoms, and to the tribal members who rely on those waters and lands for hunting, gathering and religious and cultural practices. *Id.* App. I at 9-11. In 2000, EPA also determined the Tribes were eligible for TAS under the Clean Air Act, 42 U.S.C. § 7601(d); 40 C.F.R. § 49.6, and could exercise the authority, pursuant to the governmental powers described in the Tribal Constitution and the Law and Order Code, to protect their air resources on all lands within the exterior boundaries of the Fort Hall Reservation. EPA, *Eligibility Determination for the Shoshone-Bannock Tribes for Treatment in the Same Manner as a State under the Clean Air Act* (2000). Under these decisions, the Tribes have jurisdiction over the Reservation's water and air resources – including those located on non-Indian owned fee lands.

The FMC Property and FMC's activities on the Reservation

29. The FMC Property consists of one-thousand four-hundred and fifty (1450) acres of fee land, EPA Region 10, *Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable United Pocatello, Idaho* (2012) ("IRODA") at 1, most of which is located on the Reservation. *Id*. fig. 3 (entitled "FMC Facility," showing location of FMC Property and boundaries in relation to the Reservation). On its eastern border, the FMC Property abuts the J. R. Simplot Company Don Plant. IRODA fig. 2 (showing location of FMC Property and Simplot Property in relation to the area). These properties are within the Eastern Michaud

Flats Superfund Site, National Priorities List for Uncontrolled Hazardous Waste Sites, 55 Fed. Reg. 35,502, 35,507 (Aug. 30, 1990); IRODA at 1.

30. The FMC Property is located southwest of the Portneuf River, at a higher elevation than the river. The southernmost portion of the FMC Property backs against the Bannock Range, at an elevation of five-thousand feet (5000 ft.), while the floor of the Portneuf River valley is below four-thousand four-hundred feet (4400 ft.). IRODA at 206, fig. 2. The wind in the area blows predominantly from the southwest. MWH, *Supplemental Surface Soil Radionuclide Investigation Report for the Off-Plant OU* fig. 1-2 (2010) (showing Wind Rose). The groundwater elevation, or potentiometric contour, is similar – it is higher at the southern end of the FMC Property and falls as it approaches the Portneuf River. IRODA at 212, fig. 8 ("Shallow Groundwater Flow Paths and Areas Beneath the FMC Facility"). The groundwater elevation is four-thousand four-hundred and fifty feet (4450 ft.) south of the former plant areas and the ponds at or about four-thousand three-hundred and eighty-three feet (4383 ft.) at the Portneuf River and Batiste Springs. *Id.* Groundwater flows under virtually the entire FMC Property, flowing generally to the northeast from the western and central areas of the property, and north from its eastern and central areas to Batiste Springs and the Portneuf River. *Id*.

31. FMC operated the largest elemental phosphorus plant in North America on the Property from 1949 until 2001, when it stopped producing phosphorus at the plant. Phosphorus ore was shipped to the FMC Property from on-Reservation mines and processed into elemental phosphorus there before being shipped off-site. Elemental phosphorus is a toxic, dangerous substance. It ignites or explodes when exposed to air. When exposed to water, it produces toxic gases, including phosphine, hydrogen cyanide, and hydrogen sulfide. Phosphine and hydrogen sulfide are explosive at high concentrations. FMC uses its property to store the waste products

of its phosphorus production. These include: slag, a waste product from processing that contains radioactive materials; and various other liquid and solid waste byproducts that contain reactive, toxic phosphorus, and toxic heavy metals. The slag is stored on-site in a large pile, and was and is also used to grade the property. Waste products are also stored in containment ponds on the property, suspended in water to prevent them from igniting or exploding. Additionally, liquid elemental phosphorus leaked from the plant into the ground and the soil below the property. FMC continues to store this waste on the property and has not removed the leaked phosphorus from the soil. EPA estimates that there are 5,050 to 16,380 tons of elemental phosphorus stored on the property in approximately 780,000 cubic yards of material. In total, 22 million tons of soil on the property are contaminated with slag, heavy metals or phosphorus.

EPA's enforcement under RCRA and CERCLA

32. Until 1990 elemental phosphorus production and associated waste generation and storage, including the storage of waste in ponds or surface impoundments, was exempt from the provisions of the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, governing hazardous waste permitting and management. IRODA at 151. Congress amended the RCRA in 1990 to remove the loophole for the manufacture and storage of elemental phosphorus and associated wastes, applying the RCRA to FMC's activities, but it did not make those revisions retroactive. *Id.* at 151-52.

33. In 1997, the United States contacted FMC concerning its intent to file an action against FMC for violations of RCRA, and indicated its willingness to enter into negotiations to resolve those claims. *United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition). The United States subsequently filed a complaint against FMC for violations of RCRA, and simultaneously lodged a consent decree with this Court that resolved those claims. *Id.* The consent decree provided for the remediation, pursuant to RCRA, of toxic

waste found in eleven (11) ponds on the FMC Property. *See* Consent Decree, *United States v. FMC Corp*., No. CIV-98-0406-E-BLW (D. Idaho July 13, 1999) ("RCRA Consent Decree" or "Consent Decree"). Paragraph 8 of the Consent Decree states that if "any portion of the Work requires a federal, state, or tribal permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals." *Id.* (emphasis added). This Court subsequently approved the Consent Decree, Order, *United States v. FMC Corp.,* No. 98-0406-E-BLW (D. Idaho July 13, 1999), and the Ninth Circuit affirmed that ruling, *Shoshone-Bannock Tribes*.

34. Pursuant to the Consent Decree, FMC ceased use of the toxic containment ponds covered by RCRA, drained them of water, covered them with soil caps, and installed monitoring and gas collection systems on the ponds. EPA Region 10, *Unilateral Administrative Order for Removal Action*, No. CERCLA-10-2007-0051 at 8-9 (Dec. 14, 2006) ("2006 UAO"). In January 2005, FMC certified to EPA that it had completed implementation of the remediation plan in the Consent Decree. *Id.* at 9.

35. In 2006, however, high levels of deadly phosphine gas, hydrogen cyanide, and hydrogen sulfide were detected at a toxic pond that was capped and managed under the Consent Decree. *See* 2006 UAO at 10. These gases were igniting under the pond cap. *Id.* at 10. Because the emission and ignition of these gases was a threat to public health and safety, EPA issued an additional Unilateral Administrative Order addressing the removal of phosphine gas from the RCRA pond. *See id*. at 11-12.

36. In 2010, monitoring showed that other capped ponds that were also regulated under the Consent Decree had produced and were releasing deadly levels of phosphine gas, and EPA then issued another Unilateral Administrative Order. EPA Region 10, *Unilateral*

Administrative Order for Removal Action, No. CERCLA 10-2010-0170 (June 14, 2010) ("2010 UAO"). EPA found that "[h]igh concentrations of phosphine accumulating within the RCRA Ponds and being released may present an imminent and substantial endangerment to public health or welfare or the environment." *Id*. at 13. In the 2010 UAO, EPA specifically identified members of the Tribes as potential receptors of the phosphine releases from the ponds. 2014 TCA Dec. at 19 (citing 2010 UAO at 13). EPA also found that evacuation procedures were required at the FMC Property on four (4) different occasions in 2009 because of phosphine gas escaping at the temperature monitoring sensors. 2014 TCA Dec. at 13 (citing 2010 UAO at 11).

37. Still other ponds at the FMC Property are regulated by EPA under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675. The ponds regulated under CERCLA are unlined and either uncovered or covered with permeable soil. 2014 TCA Dec. at 13-14. This allows rainwater to enter the ponds and to mix with the toxic waste.

38. Although the FMC Property was added to the CERCLA national priorities list in 1990, 55 Fed. Reg. at 35,507, EPA did not announce a Record of Decision for the property under CERCLA until 1998. EPA Region 10, *Record of Decision: Declaration, Decision Summary, and Responsiveness Summary for Eastern Michaud Flats Superfund Site Pocatello, Idaho* (1998) ("1998 ROD"). The 1998 ROD outlined an approach to remediating toxic waste ponds that FMC is using to store waste on the Reservation that were not subject to RCRA and not covered by the RCRA Consent Decree. But the 1998 ROD was not implemented. A consent decree was negotiated between FMC and the United States for that purpose, but the United States withdrew from that consent decree and this Court upheld EPA's authority to do so. *United States v. FMC Corp*., No. 99-0296-E-BLW (D. Idaho Oct. 11, 2000).

39. The 1998 ROD was fundamentally flawed. It did not address working areas of the facility, IRODA at 15, and thus did not require any remedial action at the elemental phosphorus production plant at the site. *Id.* This omission was the result of EPA's incorrect assumption that FMC would indefinitely continue to operate its plant under applicable regulatory requirements. *Id.* EPA also failed in its 1998 ROD to fully anticipate the threat of phosphorus contamination in groundwater flowing from the FMC Property and other nearby contaminated sites. IRODA at 26. At the same time it was developing the 1998 ROD for the FMC Property, EPA developed another ROD to address arsenic contamination in groundwater flowing from the nearby Simplot operable unit. *Id.* EPA anticipated that this process would also capture phosphorus contaminants in the groundwater flowing from the FMC and Simplot sites, and simultaneously developed a contingency plan to address phosphorus contamination from the FMC Property that could be triggered if needed in the future. *Id.* But EPA later determined that this arsenic extraction plan would not actually meet phosphorus contamination reduction targets, and that "augmentation" of its plan was necessary to adequately reduce phosphorus contamination from the FMC Property. *Id.* at 27.

40. EPA subsequently abandoned the 1998 ROD and in 2012 announced an Interim Record of Decision Amendment, or IRODA, to address the contamination on the FMC Property not regulated under the RCRA Consent Decree. EPA determined that "[t]he 1998 ROD for the FMC OU is no longer considered protective of human health and the environment because it didn't address contaminated soils and associated groundwater contamination there in the Former Elemental Phosphorus Production Area of the Former Operations Area, particularly under the former furnace building." IRODA at 52. EPA further found that issuance of the IRODA was "necessary to protect the public health or welfare or the environment from actual or threatened

releases of hazardous substances, pollutants, and/or contaminants into the environment from the FMC OU. *Id*. at ii. EPA also found that "[s]uch a release or threat of release may present an imminent and substantial endangerment to public health, welfare, or the environment." *Id.*

41. Under EPA's remedial plan the radioactive, pyrophoric, reactive and carcinogenic contaminants on the site will remain on the Reservation, buried under long-term "monitoring and land use controls." IRODA at 16, 18. The IRODA proposes the installation of a wastewater extraction system and the construction of earthen caps over the toxic waste ponds and radioactive fill dirt to contain radioactive particles, toxic gas, and fugitive dust, and prevent continued rainwater infiltration of the site. *Id.* at 20, 52-53. EPA also decided that no efforts to remove the buried railroad tanker cars should be undertaken, and that instead the area where the tanker cars are buried should be capped. 2014 TCA Op. at 8. But no remedial action to address this threat has yet been taken. *Id*. at 11. The tankers remain buried and uncapped on the Reservation. 2014 TCA Dec. at 11-12. EPA also suggested that future use of the land be restricted by the inclusion of covenants or other land use restrictions in the sale of the land to future owners. IRODA at 17. EPA presently intends to keep FMC's hazardous wastes on the Reservation indefinitely. 2014 TCA Op. at 9.

42. In its 2013 *Unilateral Administrative Order for Remedial Design and Remedial Action*, No. CERCLA-10-2013-0116 (June 10, 2013) ("2013 UAO"), EPA again determined that conditions at the FMC Property "may constitute an imminent and substantial endangerment to public health or welfare or the environment." *Id.* at 9-10. But none of the remedial actions of the 2012 Interim Remedy have yet been implemented, and it will take 2-4 years to do so. 2014 TCA Dec. at 13. "[N]ot all ponds on the FMC site have been capped." *Id*. Indeed, "the cap designs have not yet received EPA approval" and "the monitoring plan for phosphine gas at the

ET caps has not yet been drafted." *Id*. And EPA has not developed its plan for the wastewater extraction system to the point where they can be practically implemented. 2014 TCA Op. at 8. Even if these plans are implemented, EPA estimates that groundwater remediation could take over a century. IRODA at 53-54. Thus, the threat to public health, welfare and the environment that was the basis of EPA's IRODA and the 2013 UAO is unabated.

43. FMC, the polluter, will be tasked with implementing EPA's plan. And if any of the containment efforts fail for any reason, escape of the toxic waste or any of its by-products at certain levels could prove catastrophic to the Tribes, its members, its environment, its health, safety and welfare. 2014 TCA Op. at 10.

44. In adopting its interim plan, EPA rejected the Tribes' proposal that the Tribal Soil Cleanup Standards for Contaminated Properties regulations, which were promulgated as regulations under the WMA, be designated as "Applicable or Relevant and Appropriate Requirements" ("ARARs") under CERCLA, and that FMC be required to remove the contamination from the Reservation in compliance with the Tribes' standards. IRODA at 55, App. B § 1.36. EPA also failed to sufficiently include tribal officials in the planning process while developing its remedy. 2014 TCA Op. at 10.

45. EPA has not yet adopted a final plan under CERCLA. 2014 TCA Op. at 9.

1998 Agreement between the Tribes and FMC

46. In 1997, during the same time period that the United States and FMC were negotiating a resolution of the RCRA claims that the United States planned to bring against FMC, the Tribes and FMC began discussion of FMC's compliance with the LUPO. And on August 1, 1997, FMC applied to the LUPC for a building permit. 2012 TCA Op. at 4 n.6. But in so doing, FMC indicated that it would not submit to Tribal jurisdiction. *Id.* The LUPC responded that it could not accept the building permit application on that condition, explaining

that it had understood that, as a result of the "'FMC Initiative'" and a "July 10, 1997 [meeting] with FMC, EPA, and Tribal officials," "FMC would recognize tribal jurisdiction within the exterior boundaries of the Fort Hall Indian Reservation." Letter from Tony Galloway, Chairman, LUPC to Dave Buttelman, Health, Safety and Environmental Manager, FMC (Aug. 6, 1997). FMC's Health, Safety and Environmental Manager replied by letter of August 11, 1997, stating:

> Through submittal of the Tribal "Building Permit Application" and the Tribal "Use Permit Application" for Ponds 17, 18 and 19, FMC Corporation is consenting to the jurisdiction of the Shoshone-Bannock Tribes with regard to the zoning and permitting requirements as specified in the current Fort Hall Land Use Operative Policy Guidelines.

Letter from David Buttelman, Health, Safety, and Environmental Manager, FMC, to Tony Galloway, Chairman, LUPC (Aug. 11, 1997). *See also* 2012 TCA Op. at 4, 14. The Tribal Court of Appeals found FMC's language in this letter constitutes "specific[] consent[] to the Tribes' jurisdiction . . . ." 2012 TCA Op. at 14.

47. On April 6, 1998, the LUPC proposed amendments to the LUPO Guidelines which imposed permit fees of three dollars ($3) per ton for the storage of hazardous waste and one dollar ($1) per ton for the storage of non-hazardous waste. 2012 TCA Op. at 4, 12; proposed Amendments to Chapter V of the Fort Hall Operative Policy Guidelines.

48. On April 13, 1998, LUPC sent FMC a letter setting out the conditions on which the Tribes would issue Building and Special Use Permits to FMC. 2012 TCA Op. at 4; Letter from LUPC to Paul Yochum, FMC (Apr. 13, 1998) ("April 13, 1998 Letter"). The conditions included, *inter alia*, requiring FMC to adhere to the proposed Amendments to Chapter V of the LUPO Guidelines and to pay the annual Hazardous and Non-Hazardous waste permit fee. April 13, 1998 Letter; 2012 Tribal Op. at 4.

49. The Tribes and FMC met in May 1998 to attempt to come to an agreement to determine FMC's obligations under the LUPO and the Guidelines and the terms of proposed building and use permits. 2012 TCA Op. at 4-5; Letter from LUPC to J. Paul McGrath, Senior Vice President & Robert J. Fields, Vice President, FMC (May 19, 1998) ("May 19, 1998 Letter").

50. FMC and the Tribes finalized their negotiations in a series of letters, 2012 TCA Op. at 5. The Tribes set forth the terms of the agreement in the May 19 letter, which provides that FMC will pay the Tribes a fee of $1.5 million a year to cover hazardous and nonhazardous waste beginning in 1998 and continuing "for every year thereafter . . . ." May 19, 1998 Letter. FMC responded by expressing its appreciation for the Tribes "agreeing to the fixed fee proposal that we discussed, which we understand will apply during the time these ponds are in operation," and stating "we . . . intend to make the payments of $2.5 million on June 1, 1998, and the $1.5 million on June 1 in the following years." Letter from J. Paul McGrath, FMC, to LUPC (May 19, 1998). In a follow-up letter, FMC clarified that the language of the May 19 letter was "too narrow, and indeed it is our understanding . . . that the $1.5 million annual fee would continue to be paid for the future even if the use of ponds 17-19 was terminated in the next several years." Letter from J. Paul McGrath, FMC, to Jeanette Wolfley, LUPC (June 2, 1998). As the Tribal Court of Appeals held, "[t]hose letters provide in clear terms that FMC would obtain Tribal land use permits for its waste activities on the Reservation and pay the Tribes an initial payment of $2.5 million and thereafter pay an annual special use permit fee of $1.5 million each year, 'even if use of pond 17-19 was terminated,' *i.e.*, stopped being used for disposal in the next several years, and FMC would thereby obtain, and continue to have an exemption from the otherwise-applicable Tribal land use permitting regulations." 2012 TCA Op. at 5 (footnote omitted). By

the 1998 Agreement, FMC obtained a clear exemption from otherwise-applicable Tribal land use permitting regulations. *Id*. As the Ninth Circuit found in subsequent litigation, the 1998 letters established an agreement between FMC and the Tribes in which FMC consented to pay a fixed $1.5 million annually "in lieu of applying for certain tribal permits." *United States v. FMC*, 531 F.3d 813, 815 (9th Cir. 2008). By that agreement, FMC consented to Tribal jurisdiction.

51. FMC reaffirmed its commitment to pay the $1.5 million annual permit fee when it entered into the RCRA Consent Decree on October 16, 1998, in which FMC agreed that "[w]here any portion of the Work[3] requires a . . . tribal permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals." *Id*. ¶8. By entering into the Consent Decree, FMC reaffirmed that it had consented to Tribal jurisdiction in order to obtain the permits needed to implement the Consent Decree.

52. This Court approved the Consent Decree on July 13, 1999 over the objections of the Tribes. *United States v. FMC Corp*., No. 98-0406-E-BLW (D. Idaho July 13, 1999). The Tribes appealed to the Ninth Circuit. In its brief on appeal, FMC told the Ninth Circuit that "the existing Consent Decree provides substantial benefits to the Tribes – a point the Tribes do not, and cannot, dispute." Brief of Appellee FMC Corporation, *United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition) (No. 99-35821), 2000 WL 33996531, at *22. More specifically, FMC stated that "the Tribes granted permits to FMC for its construction and use of Ponds 17 and 18. On April 13, 1998, FMC obtained a building and special use permit for both ponds from the Tribal Land Use Policy Commissioners, subject to

[3] The "Work" means "all activities [FMC] is required to perform under this Consent Decree, together with its Attachments, except those required by Section XX (Record Retention)." RCRA Consent Decree § 1 (defining "Work").

payment of a $1 million startup fee and a $1.5 million annual permit fee payable to the Hazardous Waste Program of the Tribes Land Use Department. (CR 15 at 1415.) It is difficult to understand how the Tribes can ask this Court to overturn the District Court's entry of the Consent Decree based on the fact that the Decree permits the operation of ponds that the Tribes have permitted and for which the Tribes have and will receive millions of dollars in use fees." *Id.* at *17-18 (footnote omitted). The Ninth Circuit affirmed this Court's decision to approve the Consent Decree. *United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition).

53. FMC's acknowledgment that it had obtained the tribal permits needed to implement the Consent Decree, FMC's express recognition that that it had agreed to pay the "$1.5 million annual permit fee . . . to the Hazardous Waste Program of the Tribes Land Use Department," and its reliance on that agreement to secure approval of the Consent Decree, confirm the existence of a consensual relationship with the Tribes under the 1998 Agreement, and FMC's consent to Tribal jurisdiction for purposes of obtaining a waste storage permit and paying the annual permit fee. In essence, as the Tribal Court of Appeals found, the RCRA Consent Decree was "another form of consensual relationship involving the same subject matter [i.e., the storage of hazardous waste on the reservation] between these same parties and further supports a finding of jurisdiction." 2012 TCA Op. at 15.

54. FMC paid the annual permit fee of $1.5 million under the 1998 agreement for four years, from 1998 until 2001. *Id*. at 14. FMC's subsequent performance confirms its intent to be bound by the agreement reached in its exchange of letters with the Tribes. These actions, too, establish a consensual relationship that satisfies the first *Montana* exception.

The Amended Guidelines, the HWMA, and LUPC's letter on February 8, 2007 establish separate and independent grounds for the waste storage fee

55. The Tribal Court of Appeals correctly held that LUPO, the LUPO Guidelines, and the 1998 Guideline Amendments independently provide the LUPC with the authority to set FMC's permit fee at $1.5 million per year. 2012 TCA Op. at 29-30. The LUPO Guidelines expressly authorize the LUPC to amend their terms. *See id.* at 28 (citing LUPO Guidelines, ch. I, §§ 1-7, 1-7-1, 1-7-3). Thus, when the Tribes amended the LUPO Guidelines in 1998, additional formal approvals from the Business Council and the Secretary of the Interior were not required. *Id.* at 29. The 1998 Guideline Amendments impose a five dollars ($5.00) per ton fee for the storage of hazardous waste, and establish an independent basis for the $1.5 million annual permit fee for waste storage imposed on FMC by the LUPC.

56. The Tribal Court of Appeals further concluded that the HWMA and the WMA also provide legal authority for the LUPC's imposition of the $1.5 million fee on FMC. *Id.* at 30-35. The HWMA provides for a $5.00 per ton hazardous waste annual fee rate and $1.00 per ton non-hazardous annual fee rate. HWMA § 409. The WMA authorizes the Tribes' Waste Management Program to "establish[] a comprehensive waste permitting program, including . . . the modification . . . of permits, and permit fees." WMA § 301(A). *See also* 2012 TCA Op. at 33 (quoting language from HWMA and WMA). Thus, the WMA and the HWMA also gave the LUPC express authority to impose the $1.5 million annual permit fee on FMC. *Id.* at 33-34.

57. On February 8, 2007, LUPC issued a letter to FMC setting an annual special use permit fee of $1.5 million. *Id.* at 9. The Tribal Court of Appeals found that applicable Tribal land use laws and regulations – LUPO, the amended Guidelines, HWMA and WMA – also provided the LUPC with an independent basis to support the imposition of $1.5 million fee, separate from the 1998 letters agreement. *Id*. at 20, 27-35.

VII. PRIOR PROCEEDINGS

58. On May 23, 2002, FMC indicated by letter that it would no longer pay the annual waste storage permit fee. The Tribes replied that it expected annual fee payments to continue pursuant to FMC's 1998 agreement to do so. FMC did not pay the fee due on June 1, 2002, and refused to pay the fee or apply for tribal permits in 2003, as well. The Tribes notified FMC that it was in noncompliance with tribal ordinances by letter on December 19, 2002. After nearly two more years of noncompliance, the Tribes sent FMC a series of letters on April 6, April 16, April 21 and May 5, 2004, demanding FMC comply with Tribal law. *Id*. at 5-6.

59. The parties entered into negotiations regarding the permitting process. On May 27, 2004, the Tribes agreed to stay enforcement of its regulations pending negotiations. FMC terminated those negotiations by letter on December 6, 2005. *Id.* at 6-7.

60. On September 19, 2005, in the course of negotiations, the Tribes filed a Motion for Clarification in *United States v. FMC Corp.*, seeking clarification of FMC's obligations under the RCRA Consent Decree, in which FMC agreed to obtain tribal permits for activities at the FMC Property, allow tribal representatives access to the FMC Property to monitor FMC compliance with the Consent Decree, and provide documentation to the Tribes to show it was complying with the Consent Decree. The Court entered a Memorandum Decision and Order on March 6, 2006, *United States v. FMC Corp.*, No. CV-98-0406-E-BLW, 2006 WL 544505 (D. Idaho Mar. 6, 2006), determining that the Tribes had jurisdiction over FMC under the "consensual relationship" exception of *Montana*, in part because FMC had agreed to submit to tribal jurisdiction in Paragraph 8 of the RCRA Consent Decree. FMC subsequently filed a motion in this Court seeking reconsideration or clarification of the March 6 order, seeking relief from the tribal permit requirements. This Court denied the request on December 1, 2006. Memorandum Decision and Order, *United States v. FMC Corp.*, No. CV-98-0406-E-BLW, 2006

WL 3487257 (D. Idaho Dec. 1, 2006). FMC appealed the March 6 Order, and sought a stay of that order pending appeal, which the Ninth Circuit denied. *United States v. FMC Corp.*, 531 F.3d 813, 818 (9th Cir. 2008). FMC also appealed this Court's December 1 Order to the Ninth Circuit, which dismissed that appeal as duplicative of FMC's appeal of this Court's March 6, 2006 Order. *Id.* at 818 n.5.

61. FMC's appeal of this Court's March 6 decision to the Ninth Circuit was decided on June 7, 2008. The Ninth Circuit held that the Tribes lacked standing to enforce the Consent Decree, but acknowledged that "FMC agreed to pay the Tribes $1.5 million per year in lieu of applying for certain tribal permits," *id.* at 815, 817 ("FMC settled the tribal permit dispute by agreeing to pay the Tribes a fee of $1.5 million per year, beginning in 1998"), and required FMC to continue the Tribal proceedings concerning FMC's permit applications to their conclusion, *id.* at 823-24; *see also* 2012 TCA Op. at 7-8.

62. In March 2006, FMC applied to the LUPC for a building permit and a special use permit for waste storage in accordance with the requirements of the LUPO and the LUPO Guidelines. Letter from John T. Bartholomew, Director of Operations, FMC, to Tony Galloway, Chairman, LUPC, Transmitting Building Permit Application (Mar. 6, 2006); Letter from John T. Bartholomew, Director of Operations, FMC, to Tony Galloway, Chairman, LUPC, Transmitting Special Use Permit Application (Mar. 6, 2006). LUPC held a public hearing on FMC's permit applications on April 18, 2006, at which an FMC representative and FMC counsel appeared, FMC's counsel provided comments on the application, and the LUPC reviewed and considered written comments and documents, including documents and affidavits submitted by FMC. *In re FMC Application for Building Permit* at 1 (LUPC April 25, 2006) ("LUPC Building Permit Decision"); *In re FMC Application for Special Use Permit* at 1 (LUPC April 25, 2006) ("LUPC

Special Use Permit Decision"). On April 25, LUPC issued separate decisions on each application. The LUPC held that it had jurisdiction to require FMC to obtain a Building Permit and approved FMC's application, conditioned on FMC paying a three thousand dollar ($3000) permit fee and providing a list of contractors and subcontractors working on the project. LUPC Building Permit Decision at 1-3. The LUPC also held that it also had jurisdiction to require FMC to obtain a Special Use Permit and approved FMC's application, conditioned on FMC paying a one million five-hundred thousand dollar ($1.5 million) permit fee that had been agreed upon by FMC and the Tribes in the 1998 Agreement, and providing the Tribes with information concerning the waste stored by FMC on the Reservation, to allow LUPC to calculate the permit fee under the Guidelines in the event that FMC did not acknowledge the 1998 Agreement. LUPC Special Use Permit Decision at 3-5.

63. On May 15, 2006, FMC appealed the LUPC decisions to the Fort Hall Business Council ("FHBC") pursuant to Article V, § 6 of the LUPO. FMC Corporation's Notice of Appeal of LUPC Building Permit Decision (May 15, 2006); FMC Corporation's Notice of Appeal of LUPC Special Use Permit Decision (May 15, 2006). FMC's appeals were "fully briefed and argued," a hearing on the appeals was held before the FHBC on July 12, 2006, and the appeals were decided on July 21, 2006. The FHBC affirmed the LUPC April 25 decisions. *In re FMC's Appeals of the April 25th, 2006 Land Use Permit Decisions* (FHBC July 21, 2006).

64. FMC then appealed the FHBC decision, again in accordance with Article V, § 6 of the LUPO, by filing a verified complaint in the Shoshone-Bannock Tribal Court ("Trial Court"). Verified Complaint, *FMC Corp. v. Shoshone-Bannock Tribes' Fort Hall Business Council*, No. C-06-0069 (Shoshone-Bannock Tribal Ct. May 21, 2008); Shoshone-Bannock Trial Court Order of May 21, 2008 at 8-10. The Tribes filed an Answer denying FMC's allegations

and asserting a counterclaim, Tribes' Answer and Counterclaim, and subsequently filed an Amended Counterclaim, Amended Counterclaim. The Tribes' Amended Counterclaim alleged that: (1) FMC was subject to the Tribes' air quality permitting requirements; and (2) the 1998 Agreement was a common law contract that FMC had breached by not paying $1.5 million from years 2002 to 2007. *Id*. at 5-7. Shoshone-Bannock Trial Court Order of Nov. 13, 2007 at 10-11.

65. On December 4, 2006, after this Court denied FMC's motion for reconsideration or clarification, FMC filed a renewed motion for a stay of the LUPC's Decisions on FMC's Special Use Permit Application with the FHBC. The FHBC held a hearing on that motion on January 24, 2007, at which FMC appeared by counsel and presented argument, and denied FMC's motion on March 7, 2007. *In re FMC Corporation's Renewed Motion to Stay* (FHBC March 5, 2007). FMC appealed that decision to the Shoshone-Bannock Tribal Court in accordance with Article V, § 6 of the LUPO, by filing a verified complaint in the Trial Court. Verified Complaint, *FMC Corp. v. Shoshone-Bannock Tribes' Fort Hall Business Council*, No. C-07-0017 (Shoshone-Bannock Tribal Ct. May 21, 2008).

66. FMC did not pay the $1.5 million fee for the Special Use Permit, and on February 8, 2007 LUPC issued a decision setting an annual permit fee of $1.5 million for FMC's storage of hazardous waste on the reservation. FMC Notice of Appeal of LUPC Letter Decision Setting Special Use Permit Fee (May 15, 2006). FMC appealed the LUPC's Permit Fee Decision to the FHBC, and, after holding a hearing at which FMC appeared and argued, the Business Council affirmed the LUPC decision on June 14, 2007. *In re FMC Corporation's Appeal From the LUPC Decision Dated Feb. 7. 2007* (FHBC June 14, 2007). FMC appealed that decision to the Trial Court in accordance with Article V, § 6 of the LUPO by filing a verified complaint in the Trial Court. Verified Complaint, *FMC Corp. v. Shoshone-Bannock Tribes' Fort Hall Business*

Council, No. C-07-0035 (Shoshone-Bannock Tribal Ct. May 21, 2008). Trial Court Order of May 21, 2008 at 2.

67. The Trial Court consolidated the three actions brought by FMC, and on November 13, 2007, issued an order holding that it had jurisdiction over FMC's appeals, and that "FMC was obligated by federal law and subsequent consent decrees to apply for and obtain Tribal permits for its activities within the exterior boundaries of the Reservation," and also dismissed the Tribes' air quality and contract counterclaims. *Id*.; Trial Court Order of Nov. 13, 2007 at 11-15. On May 21, 2008, the Trial Court issued a decision on the merits that reversed most of the FHBC and LUPC decisions. The Trial Court held that: (1) FMC was required to obtain a Tribal Building Permit, but the Tribes could not impose the stated $3000 permit fee; (2) FMC was not required to obtain a special use permit; (3) the 1998 Agreement between the parties had not been incorporated into a tribal ordinance; and (4) the Tribes could not impose the $1.5 million permit fee because it had not been approved by the Secretary of the Interior under the Tribal Constitution. *Id*.; Trial Court Order of May 21, 2008 at 17-18.

68. The Tribes appealed the Trial Court decisions to the Tribal Court of Appeals and FMC cross-appealed, both pursuant to Article V, § 6 of the LUPO and the Law and Order Code. TCA Op. at 9-10. The Law and Order Code, ch. IV, § 2, provides that "on appeal, each case shall be tried anew, except for questions of fact submitted to a jury in the Trial Court." Accordingly, the Tribal Court of Appeals conducted a full trial and independent fact-finding to review the Trial Court's conclusions. The Tribal Court of Appeals issued decisions in June 26, 2012 and on April 15 and May 16, 2014. 2012 TCA Op.; 2014 TCA Dec.; 2014 TCA Op.

VIII. CLAIMS

Recognition and Enforcement of the Tribal Court Judgment

69. The allegations in paragraphs 1 through 68 are re-alleged and incorporated by reference as if set forth in full herein.

Personal jurisdiction and due process

70. The Tribal Court of Appeals had personal jurisdiction over FMC, which owns property on the Reservation, has longstanding and substantial contacts on the Reservation, and initiated the proceedings before the LUPC that were resolved by the Tribal Court of Appeals' decisions.

71. The Tribal Court proceedings afforded FMC due process of law. *Wilson*, 127 F.3d at 811. The proceedings before the Trial Court and the Tribal Court of Appeals were conducted in accordance with the Tribal Constitution and the Law and Order Code, the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1326, and other applicable federal law. Those proceedings provided due process to FMC, which appeared with counsel throughout the proceedings before the LUPC, the Business Council, the Trial Court and the Tribal Court of Appeals. FMC was given notice and had an opportunity for a full and fair hearing before an impartial tribunal where it was represented by professional counsel and obtained discovery. The issues were briefed at each level of appeal, culminating in a de novo review of facts and law before the Tribal Court of Appeals.

Subject matter jurisdiction

72. To decide whether a tribal court had subject matter jurisdiction over a non-Indian party for the purposes of enforcing a tribal court judgment, the Ninth Circuit applies the *Montana* test. *Wilson*, 127 F.3d at 813-15 (citing *Montana*, 450 U.S. at 566). When applying the *Montana* analysis to a decision of a tribal court, the federal court reviews the tribal court's

findings for fact for clear error and conclusions of federal law de novo. *FMC*, 905 F.2d at 1313-14. That standard applies to this Court's review of decisions of the Tribal Court of Appeals that hold that the Tribes have jurisdiction to require FMC to obtain a waste storage permit and pay the annual permit fee. 2014 TCA Op.; 2014 TCA Dec.; TCA Order of May 28, 2013; 2012 TCA Op.

The first Montana exception—consensual relationship between FMC and the Tribes

73. On June 26, 2012, the Tribal Court of Appeals issued an opinion holding that the Tribes have jurisdiction to require FMC to obtain a waste storage permit and pay the annual permit fee under the first *Montana* exception, which gives Indian tribes jurisdiction over non-Indians who enter into a "consensual relationship" with the tribe or its members. 450 U.S. at 565. *See* 2012 TCA Op. The Tribal Court of Appeals found that "FMC's agreement for payment and the actual performance of tendering such payment of the $1.5 million annual permit fee to the Tribes from 1998 to 2001 is precisely the type of commercial dealing contemplated in the first exception of *Montana*." 2012 TCA Op. at 14. The Tribal Court of Appeals also determined that FMC had agreed to submit itself to tribal jurisdiction in: the 1997 letter in which it agreed to apply for a tribal permit, *id.* at 14-15; and the 1998 RCRA Consent Decree, *id.* at 15. The Tribal Court of Appeals also determined that the exchange of letters between FMC and the Tribes in 1998 constituted a binding contract in which FMC agreed to pay the $1.5 million annual fee. *Id*. at 26-27, 40-42. It further found that the LUPO Guidelines, the HWMA, and the LUPC's letter to FMC of February 8, 2007 each independently authorized the imposition of the waste storage permit fee on FMC. *Id*. at 17-35.

74. On May 28, 2013, the Tribal Court of Appeals, after a hearing held on May 10 at which FMC appeared by counsel, reaffirmed these rulings, holding that "this court does have jurisdiction over respondent FMC Corporation under the first *Montana* exception and thus no

further evidence will be received on this issue," TCA Order of May 28, 2013 at 3, and that there was no need to take further evidence on the breach of contract claim because "this court previously ruled FMC voluntarily entered into a contract in 1998 with the Shoshone Bannock Tribes for payment of 1.5 million per year," *id.* at 1. The Tribal Court of Appeals also specifically rejected FMC's contention that the HWMA was invalid for lack of approval by the Secretary of the Interior, ruling that the HWMA "is the law on the Shoshone Bannock reservation." *Id.* at 3.

75. The Tribes' waste storage permit requirement and annual permit fee fits squarely within the first *Montana* exception, which recognizes that a tribe may exercise jurisdiction over nonmembers who enter into "consensual relationships" with the tribe through "'commercial dealing, contracts, leases, or other arrangements.'" *Salish Kootenai College*, 434 F.3d at 1136 (quoting *Montana*, 450 U.S. at 565). *See, e.g.*, *LaRance*, 642 F.3d at 817 (corporation's long-term business lease with tribe established a consensual relationship). And the law is well-settled that the imposition of a permit tax under tribal law fits within the first *Montana* exception. *Strate v. A-1 Contractors,* 520 U.S. 438, 457 (1997) (citing cases).

76. A non-Indian party's actions in court proceedings can also establish a consensual relationship. *See Salish Kootenai College*, 434 F.3d at 1133, 1136, 1140. FMC has consented to the Tribes' jurisdiction by entering into the RCRA Consent Decree, which the Tribal Court of Appeals found was "another form of consensual relationship involving the same subject matter [i.e., the storage of hazardous waste on the reservation] between these same parties and further supports a finding of jurisdiction." 2012 TCA Op. at 15. In the RCRA Consent Decree, FMC agreed that "[w]here any portion of the Work requires a … tribal permit or approval, [FMC] shall submit timely and complete applications and take all other actions necessary to obtain all

such permits or approvals." *See* Consent Decree ¶8. This text shows FMC consented to tribal jurisdiction in order to obtain the necessary tribal permits in connection with its efforts to clean up the FMC Property. FMC confirmed this in its brief to the Ninth Circuit opposing the Tribe's appeal of this Court's order approving the RCRA Consent Decree by stating that "the Tribes granted permits to FMC for its construction and use of Ponds 17 and 18. On April 13, 1998, FMC obtained a building and special use permit for both ponds from the Tribal Land Use Policy Commissioners, subject to payment of a $1 million startup fee and a $1.5 million annual permit fee payable to the Hazardous Waste Program of the Tribes Land Use Department. . . . It is difficult to understand how the Tribes can ask this Court to overturn the District Court's entry of the Consent Decree based on the fact that the Decree permits the operation of ponds that the Tribes have permitted and for which the Tribes have and will receive millions of dollars in use fees." Brief of Appellee FMC Corporation, *United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161 (9th Cir. 2000) (No. 99-35821), 2000 WL 33996531 at *17-18 (footnote omitted).

77. Furthermore, when the Ninth Circuit later held that the Tribes lacked standing to enforce the Consent Decree, the Circuit Court specifically acknowledged that "FMC agreed to pay the Tribes $1.5 million per year in lieu of applying for certain tribal permits," *FMC*, 531 F.3d at 815, 817 ("FMC settled the tribal permit dispute by agreeing to pay the Tribes a fee of $1.5 million per year, beginning in 1998"), and expressly preserved "the main relief that the Tribes sought in this action" by requiring FMC to continue the Tribal proceedings concerning FMC's permit applications to their conclusion. *id.* at 823-24. *See also* 2012 TCA Op. at 7-8.

78. The consensual relationships between FMC and the Tribes provide a tight nexus with the present dispute. At issue is FMC's refusal to obtain a waste storage permit and pay the agreed-upon $1.5 million annual permit fee. The imposition of a permit tax under tribal law fits

squarely within the first *Montana* exception. *Strate*, 520 U.S. at 457 (citing cases). And as the Tribal Court of Appeals found, the consensual relationships described above show that FMC expressly agreed to make those payments. Finally, under the LUPO Guidelines, those payments are dedicated to LUPC costs related to the Hazardous Waste Management Program. LUPO Guidelines, §§ V-9-1(C), V-9-2(B).

79. As the Tribes have regulatory jurisdiction over FMC under the first *Montana* exception, the Tribal Courts have jurisdiction to adjudicate disputes arising from the exercise of that authority in the Tribal Court. *See* 2012 TCA Op. at 14-15; 2014 TCA Op. at 4, 15; 2014 TCA Dec. at 32; *Wilson*, 127 F.3d at 814-15 (applying *Montana* exceptions to determine tribal court jurisdiction); *LaRance*, 642 F.3d at 815 (the court "determine[s] whether adjudicative jurisdiction exists" by "first determin[ing] whether regulatory jurisdiction exists"). *See also Attorney's Process & Investigation Servs.*, 609 F.3d at 936 (quoting *Nevada v. Hicks,* 533 U.S. 353, 367 n.8 (2001)) (the existence of tribal adjudicative jurisdiction "'turns upon whether the actions at issue in the litigation are regulable by the tribe.'"). In such a case, the exercise of adjudicative jurisdiction does not conflict with the principle that under *Montana* "'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,'" *Attorney's Process & Investigation Servs.*, 609 F.3d at 936 (quoting *Strate*, 520 U.S. at 453), and its recognition is necessary to comport with "the tribe's inherent sovereignty," "long-standing principles the Supreme Court has repeatedly recognized," and "Congress's interest in promoting tribal self-government." *LaRance*, 642 F.3d at 816.

Second Montana exception—threatens or has some direct effect on the tribe

80. The Tribal Court of Appeals set a discovery deadline and granted an evidentiary hearing to consider evidence on the issue of whether the Tribes have jurisdiction over FMC under the second *Montana* exception. TCA Order of May 28, 2013 at 3; Shoshone-Bannock

Tribal Court of Appeals Corrected Minute Entry and Order, Nunc Pro Tunc of February 5, 2013 at 3. The hearing was held from April 1 through April 15, 2014. 2014 TCA Op. at 1. The Tribal Court of Appeals announced its decision from the bench at the conclusion of the hearing, 2014 TCA Dec. at 1, and issued its opinion on May 16, 2014, holding that "the Tribes have met their evidentiary burden of demonstrating that the second *Montana* exception has been met" and that "[t]he evidence presented at trial shows that the FMC's [sic] activities on its fee land have created an ongoing threat to the health, welfare and cultural practices of the Tribes and their members. EPA's regulatory involvement in the site emphasizes the severity of the threat, while the evidence shows that the agency's containment plan, by design, leaves the threat in place for generations to come. The evidence at trial also shows that FMC's waste creation and storage have some direct effect on the political integrity, economic security, or the health and welfare of the Tribes." 2014 TCA Op. at 4-5. The Tribal Court of Appeals entered a separate judgment the same day ordering FMC to pay the Tribes its unpaid tribal storage permit fees from the period 2002 onward, and the Tribes' costs and attorney's fees. *See* Tribal Court Judgment.

81. The Tribal Court of Appeals correctly held that "[t]o establish jurisdiction under the second *Montana* exception, the Tribes must demonstrate that the conduct of FMC on its fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" 2014 TCA Op. at 4 (quoting *Montana*, 450 U.S. at 566). "The use of the disjunctive 'or' between the words 'threatens' and 'has some effect' indicates there are two scenarios that can satisfy the second exception: 1) The threat of harm; or 2) actual harm. As the Supreme Court has said, '[t]he logic of *Montana* is that certain activities on non-Indian fee land . . . or certain uses . . . may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated.'" *Id*. at 11

(quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 334-35 (2008)) (alterations in original); *id.* at 12 (quoting *Plains Commerce,* 554 U.S. at 341) (The *Plains Commerce* court "also said the second exception authorizes the tribe to exercise civil jurisdiction when non-Indian conduct menaces the political integrity, the economic security, or the health or welfare of the tribe. The word 'menaces' connotes a threat of harm, rather than harm itself.") (citation omitted). *See also Montana v. U.S. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (second exception applies to threats to tribal health and welfare, including threats to water rights).

82. The second *Montana* exception authorizes a tribe to regulate the activities of non-Indians on non-Indian owned fee land "through taxation, licensing or other means." 450 U.S. at 565. Thus, the Tribes' imposition of a waste storage permit requirement and annual permit fee under the LUPO, the LUPO Guidelines, and the HWMA is a form of regulation that falls squarely within the second *Montana* exception. The imposition of these regulatory requirements enables the Tribes to monitor the contamination on the FMC Property and its migration, as well as FMC's and EPA's efforts to contain it, and participate in environmental remediation activities as necessary to protect Tribal lands, waters, natural and cultural resources, and the health and welfare of Tribal members. Under Tribal law, waste storage permit fees are dedicated to LUPC costs related to the Hazardous Waste Management Program. LUPO Guidelines, § V-9-2(B); HWMA, § 409(D). In sum, the exercise of jurisdiction in this case is necessary to protect the Tribes from the threat of harm posed by the contamination on the FMC Property and its migration.

83. The Tribal Court of Appeals correctly held that a tribe can exercise jurisdiction under the second *Montana* exception in order to avert a threat to its members. 2014 TCA Op. at 11. As the court explained:

> The fact that a threat of harm can justify tribal regulation is also demonstrated by *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), in which the owner of on-reservation fee land was subject to tribal regulation despite having simply filed permits to construct buildings and a sewage disposal system. *Id*. at 440 (Stevens, J.). No work had begun and nothing other than the filing of permits had taken place. Yet, the United States Supreme Court recognized the Tribe's civil jurisdiction over his activities merely based on what might happen. *Id*. at 443.

2014 TCA Op. at 12. In addition, "*Brendale* has significance to this case, as the Shoshone-Bannock Tribes are seeking to enforce a land use policy ordinance permit requirement for the storage of toxic and deadly waste that generates the emission of deadly gases and contaminates ground water, both to protect the quality of their land and natural resources, and to protect their members' ability to take part in important cultural ceremonies that cannot be performed because of contamination in the Portneuf River. In sum, a catastrophe does not have to happen for the Tribes to assert jurisdiction in this case." 2014 TCA Op. at 12-13.

84. The Tribal Court of Appeals found that from 1947 to 2001, FMC operated the largest elemental phosphorus production facility in North America on the Reservation, 2014 TCA Dec. at 24, and that FMC continues to store over twenty-two million (22,000,000) tons of hazardous and non-hazardous waste on the Reservation. 2014 TCA Op. at 2. "As described in EPA's Interim Amendment to the Record of Decision for the EMF Superfund Site FMC Operable Unit Pocatello, Idaho (2012) ('IRODA') at 7-9, that waste is present on the site in the following forms: elemental phosphorus that leaked into the subsurface soil during production; elemental phosphorus and chemical byproducts from the phosphorus production process suspended in contaminated water that are contained in ponds on the site; phosphine gas produced

by elemental phosphorus; contaminated rail cars buried at the site that were used in the transport of elemental phosphorus; and contaminated groundwater containing arsenic and phosphorus that seeped into the groundwater from other sources of contamination on the site. The site was also filled and graded using millions of tons of slag that contains radioactive materials which emit gamma radiation in excess of EPA's human health safety standards." 2014 TCA Op. at 5-6. (citing IRODA at 7-9) (footnote omitted). The Tribal Court of Appeals further found that these conclusions, and all of EPA's other conclusions in the IRODA were uncontested by FMC at trial. *Id.* at 6 n.2.

85. The Tribal Court of Appeals also held that "[t]he contamination on the FMC site is unprecedented, in the sense of scale, but also in observers' inability to determine its scope: 'There are significant unknowns beyond the actual volume of contaminated soils, including the horizontal and vertical gradients in the concentrations of elemental phosphorous, the total mass of elemental phosphorous, and the form of elemental phosphorous in the soil.'" *Id*. at 6 (quoting IRODA at 83).

86. The elemental phosphorus (or "P4") that was produced at the FMC Plant was refined from mined ore, which contains heavy metals and radioactive materials. 2014 TCA Op. at 2, 5-6. The ore was prepared and mixed with coal coke and silica, and then put into furnaces that burned off the unwanted materials and heated the phosphorus into a gas, which was collected and cooled to a liquid. IRODA at 7-8. The burning of phosphorus ore produces a waste known as slag, which contains radioactive isotopes. IRODA at 8.

87. Undetected leaks in the refining system allowed liquid phosphorus to leak directly into the soil below FMC's phosphorus processing facility, where it made its way as much as 80 to 100 feet below the surface. 2014 TCA Op. at 6. The deposits of elemental phosphorus that

leaked from FMC's former facility for fifty-plus years of phosphorus production are unprecedented in size. IRODA at 83. As much as 16,000 tons of phosphorus remains in the soil, contaminating approximately 780,000 cubic yards of soil, and weighing approximately 1 million tons. 2014 TCA Op. at 6 (citing IRODA at 21, 78, & tbl. 2).

88. Particles of P4 and other elements in the phosphorus ore were ejected in the smoke produced by the burning of phosphorus ore. *See* 1998 ROD at 12. These dust particles were extracted from the smoke and immersed in water to prevent reactions with oxygen in the air. *Id*. The resulting mixture, known as "slurry," was pumped into unlined, uncovered ponds on the FMC Property and stored there. *Id*.; IRODA at 8. Additional ponds were used by FMC to store tainted water that had been used in phosphorus processing or the cleaning of phosphorus processing equipment. 1998 ROD at 12; IRODA at 8. There are approximately twenty-three (23) waste storage ponds on FMC's site. 2014 TCA Op. at 7 (citing 2006 UAO at 10-12).

89. Elemental phosphorus is reactive and pyrophoric, meaning that it bursts into flames or explodes when exposed to air. 2014 TCA Op. at 6 (citing IRODA at 77). Exposure of elemental phosphorus to air also produces numerous chemical byproducts, which further react to form phosphoric acid aerosols. *Id.* Elemental phosphorus is toxic to humans when inhaled, ingested or absorbed through the skin. *Id.* (citing IRODA at 78). One aspect of the danger posed by the elemental phosphorus stored on the Reservation is shown by the testimony of the Tribes' witness Claudeo Bronco, who saw ducks spontaneously ignite as they took off from FMC's phosphorus containment ponds. 2014 TCA Op. at 6-7 (citing 2014 TCA Dec. at 18). As elemental phosphorus remains reactive for thousands of years, the danger it poses effectively never expires. *Id.* at 7.

90. When elemental phosphorus is exposed to water, it produces phosphine gas, which is harmful and even deadly to humans at certain levels; indeed, it is the active ingredient in some poisons. 2014 TCA Op. at 7 (citing IRODA at 77). Phosphine gas is heavier than air and flows along the surface of the ground by force of gravity. Letter from Kai Elgethun, Public Health Toxicologist/Health Assessor, Idaho Dep't of Health and Welfare, to Greg Weigel, EPA Idaho Operations Office 2 (June 1, 2010). Phosphine gas is also reactive at high concentrations, meaning that it too will burn or explode when exposed to air. 2006 UAO at 11. Some of the waste storage ponds on the FMC Property emit phosphine gas, as well as hydrogen sulfide and hydrogen cyanide, gases which are also toxic. 2014 TCA Op. at 7 (citing 2006 UAO at 10-12); IRODA at 7. Hydrogen sulfide is flammable, and inhalation of it can cause long-term neurological effects and death. 2006 UAO at 11-12. Hydrogen cyanide is explosive and can cause rapid death by asphyxiation if it is inhaled or absorbed. *Id*. at 12.

91. In June of 2010, the Idaho Department of Health and Welfare evaluated an EPA air sample and notified the EPA that phosphine gas being released from a pond on FMC's property is:

> an urgent public health hazard to the health of people breathing the air in the proximity of Pond 15S, including workers, visitors to the pond area and any potential trespassers in the pond area . . . breathing the air for just a few seconds could cause measurable harm and could be lethal . . . . People near the Pond 15S perimeter and immediately downwind of [15S] could also be breathing phosphine at levels that could cause respiratory tract irritation if exposed for 8 hours a day . . . .

2014 TCA Op. at 7 (citing 2014 TCA Dec. at 21).

92. The Tribal Court of Appeals found that the threat posed by phosphine gas extends to members of the Shoshone-Bannock Tribes. "We note that the EPA, in its 2010 Unilateral Administrative Order for Removal Action noted the following: 'Potential receptors of the phosphine, released from the RCRA Ponds include...members of the Shoshone Bannock Tribes.'

Even if this potential has been lessened, we saw no evidence to indicate it has been eliminated or that it will ever be eliminated." 2014 TCA Dec. at 19-20 (ellipsis in original). The toxicity, density, reactivity, and mobility of the phosphine generated on the Reservation threatens Tribal health and welfare.

93. The Idaho Department of Health and Welfare report also found that monitoring for phosphine gas once a day, as FMC has done at the fence line on the site, is not adequate to identify risk to the public at the fence line from phosphine and that more frequent monitoring is necessary for that purpose. 2014 TCA Dec. at 20-21. The Tribal Court of Appeals ruled that this evidence corroborated the testimony of an expert witness for the Tribes, a former EPA official, that EPA's testing strategies were not sufficient to protect the health and welfare of tribal members. *Id*. at 21.

94. Phosphorus sludge was stored and transported by FMC in heated railroad tanker cars. When some of these tanker cars were no longer needed, FMC decided to dispose of them on the FMC Property. FMC determined that the internal design of the tanker cars made it too dangerous to clean out all of the phosphorus sludge before scrapping or selling them. So in 1964, FMC decided to bury twenty-one (21) of these tanker cars on the FMC Property without cleaning them. The tanker cars remain buried on the FMC Property under 80 to 120 feet of clay and radioactive slag. 2014 TCA Op. at 7-8.

95. The tanker cars are estimated to have contained ten to twenty-five percent (10-25%) of their capacity in phosphorus sludge when buried. 2014 TCA Op. at 8. The tanker cars were not designed for the long-term storage of phosphorus sludge underground. The level of corrosion in the tanker cars is unknown, and they could corrode – and may have already – to the point where they release phosphoric acid produced by the phosphorus" into the soil. *Id*. The

toxicity of the cars' contents and the groundwater flow path beneath the FMC Property establish that the storage of the buried tanker cars on the Reservation threatens Tribal health and welfare and the lands, waters and natural resources of the Reservation.

96. Phosphorus and arsenic that leaked into the soil on the FMC Property continue to migrate down through the soil column until they reach the groundwater that naturally flows underneath the property. 2014 TCA Op. at 8; IRODA at 31-32. The groundwater flows north-east from the FMC Property, then travels north-west underneath the Fort Hall Reservation, before eventually discharging into the Portneuf River, which flows through the western part of the reservation. IRODA at 4, 22, 212 (fig. 8), 219 (fig. 15). As a result, arsenic and phosphorus from the site are continuously flowing in the groundwater from FMC's land through seeps and springs directly into the Portneuf River and the Fort Hall Bottoms, both of which are on the Reservation, and are vital cultural recourses of the Tribes. 2014 TCA Op. at 8-9 (citing 2014 TCA Dec. at 12, 16, 29). The quantity and toxicity of the phosphorus that FMC leaked into the soil and the groundwater flow path beneath the FMC Property establish that the storage of phosphorus on the Reservation threatens Tribal health and welfare, and the lands, waters and natural resources of the Reservation.

97. The Tribes have a recognized water right in the Portneuf River under the *Winters* doctrine. *See* 1990 Fort Hall Indian Water Rights Agreement at 32-33, § 7.1.14. The contamination of the Portneuf River threatens drinking water supplies. 2014 TCA Dec. at 27 (quoting 2013 UAO at 9). Some tribal members also rely on fish from the Portneuf as a food source. IRODA at 4. And Tribal members use the Fort Hall Bottoms as a site for traditional cultural practices involving fishing and gathering plants that grow along the river. *Id.* All of these resources are directly affected by the intermingling of contaminated groundwater with the

surface water of the River. Contaminants are killing aquatic animals and affecting the life cycles of aquatic plants on the Reservation. IRODA at 32-33. Compounds containing phosphorus that are carried into the surface water of the Portneuf River also cause changes in algae and plant growth that inhibit dissolved oxygen in the water. *Id*. at 33. This has an adverse effect on fish and other aquatic life in the Portneuf River, *id*., and directly impacts tribal members' abilities to use the Portneuf River for subsistence fishing, 2014 TCA Op. at 8 (citing 2014 TCA Dec. at 12). That impact has a direct and concrete effect on Tribal rights to Reservation waters and natural resources and on Tribal health and welfare.

98. The contamination has directly affected the use the Portneuf and the Fort Hall Bottoms for ceremonial purposes by tribal members. *Id*. Tribal members no longer use the Fort Hall Bottoms along the Portneuf River to collect plants and animals because the arsenic contamination in that area has made it unsuitable for ceremonial purposes. That area is also no longer relied on for the resources necessary to the Sundance because the pollution from FMC's activities has interfered with the purity of the area. *Id*. In sum, the contamination of the Portneuf River has had a destructive effect on tribal cultural practices. 2014 TCA Op. at 11 (citing 2014 TCA Dec. at 29-31). That impact has a direct and concrete effect on the Tribes' rights to make the Reservation their permanent home and to protect and maintain Tribal culture.

99. The Tribal Court of Appeals found it was an uncontroverted fact that FMC had interfered with the customs and traditions of the Tribes' members, 2014 TCA Dec. at 29-30, and held that *Brendale* demonstrates that such interference is catastrophic. *Id*. at 31. In *Brendale*, the non-Indian's proposed conduct placed "critical assets" of the Tribe's land in jeopardy, "drastically diminish[ing]" the "intangible values" that the Tribe's land had for the cultural and spiritual life of the Tribe. 492 U.S. at 443 (Stevens, J.). As the Tribal Court of Appeals found,

FMC's conduct has had disastrous effects on the Tribes' cultural and spiritual practices, and the existence of toxic waste on the Reservation will continue to threaten the Tribes for years to come. 2014 TCA Dec. at 20, 30

100. EPA has estimated that FMC left over twenty million tons of slag and filler containing slag on the Reservation. IRODA, tbl. 2. The slag FMC used as fill contains radium-226, which produces gamma radiation, a dangerous carcinogen. *See* IRODA at 94, 112-13; Hanna Assocs., Inc., *Supplemental Human Health Risk Assessment for the FMC Plant Site* (rev'd 2009) (hereinafter "HHRA") at 13. The slag at the FMC Property emits gamma radiation in excess of EPA human health standards. 2014 TCA Op. at 6 (citing IRODA at 7-9). Contaminants on the site, including radioactive slag and metals in phosphorus byproducts and waste materials, pose a carcinogenic risk for people who come into contact with them or accidentally inhale or ingest them, either in groundwater or in fugitive dust particles. *Id*. These contaminants are subject to dispersion by air, and air deposition from FMC Plant emissions has dispersed contaminants to surface soil off the FMC Property. IRODA at 9.

101. FMC also leased land on the FMC Property to the Bannock Paving Company, which operated a paving and aggregate handling facility, crushing slag and ferrophos and batching asphalt, until March 12, 1995. 1998 ROD at 12. In 1996, EPA issued an Administrative Order on Consent ("1996 AOC"), to which FMC and The Monsanto Company were parties, in which FMC agreed to take action to address "the release of radionuclides associated with elemental phosphorus slag in Southeast Idaho," and EPA determined that "the handling or use of slag as a construction material in buildings, roads and other construction is Southeast Idaho may present an imminent and substantial endangerment to public health or the environment." EPA Region 10, Administrative Order on Consent, No. 10-96-0045-RCRA

(1996) at 1, 4. A study commissioned by Monsanto and FMC pursuant to the 1996 AOC determined that twenty percent of the streets within the Reservation contained slag, and that over 100 residents of the Reservation had been exposed to doses of gamma radiation in amounts that exceeded background levels. Auxier & Assoc. Inc., *Elemental Phosphorus Slag Exposure Study, Phase I Final Report* (Apr. 14, 1999) at iii, tbl. 4 (Individual TLD Results Fort Hall). FMC's production, storage, and use of slag on the FMC Property threatens Tribal health and welfare.

102. In sum, "[t]he evidence presented at trial shows that the FMC's [sic] activities on its fee land have created an ongoing threat to the health, welfare and cultural practices of the Tribes and their members. EPA's regulatory involvement in the site emphasizes the severity of the threat, while the evidence shows that the agency's containment plan, by design, leaves the threat in place for generations to come. The evidence at trial also shows that FMC's waste creation and storage have some direct effect on the political integrity, economic security, or the health and welfare of the Tribes." 2014 TCA Op. at 5.

103. The Tribal Court of Appeals correctly held that the second *Montana* exception is satisfied because:

> 1. The millions of tons of slag deposited and remaining on the FMC site, which emit gamma radiation in excess of EPA human health standards, threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes.
>
> 2. The as much as 16,000 tons of reactive and ignitable elemental phosphorus in the soil at the FMC site, that contaminate over 780,000 cubic yards of soil, threaten or have some direct effect on the political integrity, the economic security, or the health and welfare of the Shoshone-Bannock Tribes.
>
> 3. The 23 waste ponds located on the FMC site threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes because they

contain reactive elemental phosphorus and other dangerous contaminants and emit toxic gasses.

4. The contaminated rail cars buried at the FMC site threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes.

5. The heavy metals, including arsenic and phosphorus, leaching into the groundwater at the FMC site threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes by flowing into the Portneuf River.

6. The phosphine gas emitted from the waste ponds threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Shoshone-Bannock Tribes."

2014 TCA Op. at 14-15. The Tribal Court of Appeals further held that "the tribes have demonstrated a specific concern about a specific project by the defendant (storage of toxic waste) and that the concerns of the tribe were not based on speculation. Rather, the tribes' concerns have been bolstered and substantiated by testimony from multiple experts." 2014 TCA Dec. at 17.

104. EPA has determined that the conditions on the FMC Property "may present an imminent and substantial endangerment to public health or welfare or the environment." IRODA at ii. But it has no plans to remove these contaminants from the Reservation. Accordingly, EPA's involvement in containing the threat will not eliminate the existence of the threat. 2014 TCA Op. at 10. As the Tribal Court of Appeals correctly held, "EPA's regulatory involvement in the site emphasizes the severity of the threat, while the evidence shows that the agency's containment plan, by design, leaves the threat in place for generations to come." 2014 TCA Op. at 5. The evidence shows that the threat from the contaminants at the FMC Property is already present, that "if any of the containment efforts fail for any reason, escape of the toxic waste or any of its by-products at certain levels could prove catastrophic to the tribe, its members, its

environment, its health, safety and welfare," 2014 TCA Dec. at 22, that the "threat of a catastrophe does exist here" which is "'disruptive to the tribes' social welfare,'" and is "'*of a catastrophic nature in health and reactions, including death. The threat from the FMC site is real, it is not a mere potential. The threat and the exposures are already present*,'" *id*. at 23 (quoting from Tribes' expert witness testimony). These conclusions are reinforced and independently supported by EPA's finding and conclusions, *id*. at 23-25, which FMC did not contest, *id*. at 28. The threat of such catastrophic consequences justifies tribal regulatory authority under the second *Montana* exception. *Montana* exists to give the Tribes authority to act to avert the catastrophic effects of a non-Indian's actions. 2014 TCA Op. at 13.

105. The Tribal Court of Appeals correctly held that the exercise of jurisdiction by EPA does not deprive the Tribes of jurisdiction over FMC's storage of contaminants. 2014 TCA Op. at 5. Thus the fact that EPA has proposed containment remedies does not affect the Tribes' authority. Otherwise the Tribes would be virtually powerless to address the contamination of their own Reservation by FMC, even though the purpose of the second *Montana* exception is to protect "the right of reservation Indians to make their own laws and be ruled by them." *Strate*, 520 U.S. at 458 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)) (internal quotations omitted). The exercise of this right is a critical component of the "political integrity" of a tribe, a basic tribal interest protected under the second *Montana* exception. 450 U.S. at 566. By its very nature, this interest cannot be vindicated by another government or government agency. Only a tribe can make its "own" laws.

106. EPA's remedies also fail to protect the Tribes' special and unique interest in the Fort Hall Reservation, which was guaranteed to the Tribes as a homeland by solemn treaty promise of the United States. 1868 Treaty, arts. II, IV. The overwhelming majority of land on

the Reservation is tribal land or trust land held by the United States for the Tribes and their members. *FMC*, 905 F.2d at 1312. As the Supreme Court has recognized, tribes have the right to the resources necessary to make their reservations livable, *Arizona*, 373 U.S. at 599-600, and maintain their ways of life, *Menominee Tribe*, 391 U.S. at 406. For the Tribes, that means protecting unique cultural interests that EPA necessarily does not share, since it is not a tribal member or participant in tribal culture. *See* IRODA at 149. In the development of EPA's failed 1998 ROD, the Tribes determined that this cultural knowledge is inherently private and in some cases sacred, and so it would be inappropriate to reveal that knowledge to non-members, like EPA officials. *Id*. Since EPA cannot and will not know how these cultural interests are affected by pollution, it does not share in the Tribes' role as protector of cultural resources on the Reservation.

107. The Tribal Court of Appeals also correctly held that the remedial actions ordered by EPA are not adequate to protect Tribal interest because those actions have generally not yet been implemented. "EPA's plans remain just that: Plans. Although the EPA has been involved at this site since 1990, remedial actions chosen by the EPA have not been implemented. [2014 TCA Dec. at 15.] Many of EPA's proposed remedial actions are still in design phase only, and the threat at the site still remains today." 2014 TCA Op. at 9 (citing IRODA at 19). More specifically, the Tribal Court of Appeals found that: (a) "[n]ot all the ponds on the FMC site have been capped," and "20 CERCLA ponds are not lined with synthetic liners;" (b) "[e]ven the cap designs have not yet received EPA approval;" (c) "[e]ven the monitoring plan for phosphine gas at the ET caps has not yet been drafted;" (d) "any monitoring required by the EPA is being done by FMC and not outside contractors;" (e) "FMC witness Barbara Ritchie . . . testified that . . .

[n]one of the remedial actions set forth in the 2012 IROD have been completed and that it will take 2-4 years to do so . . . ." 2014 TCA Dec. at 13-14.

108. And even after it is in place, the IRODA calls for the toxic waste to remain on the Reservation indefinitely, where it will continue to exude poison gas, emit radioactive gamma particles and seep into groundwater. "EPA's plans are containment plans, which would keep the threatening hazardous wastes on fee land for the indefinite future." 2014 TCA Op. at 9. Thus, EPA's strategy actually guarantees the continuation of the threat to the Tribes by requiring that the hazardous waste remain on the Reservation. Indeed, EPA has decided to store even more hazardous waste on the Reservation, as shown by its decision to require FMC to scrape radiation contaminated soil from RA-J, which is located off-Reservation in the Northern Properties, and relocate it to the FMC Property on the Reservation, IRODA at 68, and its decision to keep twenty-one (21) railroad tanker cars containing phosphorus sludge buried on the Reservation, *id*. at 154. EPA enforcement, then, does not significantly reduce the threat to the Tribes or undermine their exercise of civil jurisdiction over FMC

109. Furthermore, as the Tribal Court of Appeals found "EPA's IRODA is itself only an interim measure, and according to the IRODA, a final Record of Decision will not be available for five to ten years." 2014 TCA Op. at 9 (citing IRODA at 19). The adequacy of a plan that does not exist – to which FMC has not been asked to commit – cannot be said to protect tribal interests. That is especially so given the history of EPA's exercise of jurisdiction over the FMC Property, which shows that EPA's actions do not necessarily reduce the threat of that contamination to the Tribes or their members. "[A]t one point or another efforts by FMC to adequately store and contain toxic waste on the fee land in question have failed to varying degrees. . . . [N]o person or organization, not even the EPA, has absolutely guaranteed that

actions of the EPA or FMC to contain said toxic waste will be successful for any definite period of time in the future . . . ." 2014 TCA Dec. at 7. The plan set forth in the RCRA Consent Decree failed to contain the phosphine generated by the waste stored by FMC on the Property, which required EPA to issue the 2006 UAO, and then the 2010 UAO. And the 1998 ROD that EPA promulgated under CERCLA was never implemented. The 1998 ROD was also fundamentally flawed, as it did not require remedial actions at the elemental phosphorus production plant at the site. IRODA at 15. This gap in coverage was the result of an incorrect assumption that FMC would indefinitely continue to operate its plant under applicable regulatory requirements. *Id*. EPA also failed in its 1998 ROD to fully anticipate the threat of phosphorus contamination in groundwater flowing from the FMC Property and other nearby contaminated sites. *Id*. at 26.

110. Tribal jurisdiction is necessary so that the Tribes can monitor the contamination on the FMC Property and its migration, participate in environmental remediation and emergency response activities as necessary, and protect Tribal political integrity, economic security, health, and welfare. The waste storage permit fees, which are dedicated to LUPC costs related to the Hazardous Waste Management Program, amended LUPO Guidelines, §§ V-9-1(C), V-9-2(D), are essential for that purpose.

111. As the Tribes have regulatory jurisdiction over FMC, the Tribal Courts have jurisdiction to adjudicate disputes arising from the exercise of that authority in the Tribal Court. *See* 2012 TCA Op. at 14-15; 2014 TCA Op. at 4, 15; 2014 TCA Dec. at 32; *Wilson*, 127 F.3d at 814-15 (applying *Montana* exceptions to determine tribal court jurisdiction); *LaRance*, 642 F.3d at 815 (the court "determine[s] whether adjudicative jurisdiction exists" by "first determin[ing] whether regulatory jurisdiction exists"). *See also Attorney's Process & Investigation Servs.*, 609 F.3d at 936 (quoting *Hicks*, 533 U.S. at 367 n.8) (the existence of tribal adjudicative jurisdiction

"turns upon whether the actions at issue in the litigation are regulable by the tribe"). In such a case, the exercise of adjudicative jurisdiction does not conflict with the principle that under *Montana* "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Attorney's Process & Investigation Servs.*, 609 F.3d at 936 (quoting *Strate*, 520 U.S. at 453), and its recognition is necessary to comport with "the tribe's inherent sovereignty," "long-standing principles the Supreme Court has repeatedly recognized," and "Congress's interest in promoting tribal self-government." *LaRance*, 642 F.3d at 816.

112. The Tribes have regulatory and adjudicatory jurisdiction to require FMC to obtain a waste storage permit and pay the annual permit fee, and to adjudicate disputes arising from the exercise of that authority under the second *Montana* exception.

Recognition and enforcement of the Tribal Court Judgment

113. The 2012 and 2014 Tribal Court Opinions and the Tribal Court Judgment against FMC entered on May 16, 2014 are entitled to recognition and enforcement by this Court.

IX. PRAYER FOR RELIEF

WHEREFORE, the Tribes request that this Court enter an order and judgment against FMC declaring that the Tribal Court Opinions of June 26, 2012 and May 16, 2014, and the Tribal Court Judgment of May 16, 2014, are entitled to recognition and enforcement by this Court, and that this Court recognize and enforce the Tribal Court Judgment against FMC.

DATED this 30th day of January 2015.

SHOSHONE-BANNOCK TRIBES

/s/ William F. Bacon
William F. Bacon, General Counsel

ECHO HAWK LAW OFFICE

/s/ Paul C. Echo Hawk
Paul C. Echo Hawk, Special Counsel

SONOSKY CHAMBERS, SACHSE, ENDRESON & PERRY, LLP

/s/ Douglas B. Endreson
Douglas B. L. Endreson
Frank S. Holleman
admission pro hac vice pending

Attorneys for Shoshone-Bannock Tribes